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IN THE

Supreme Court of the United States

October Term, 1942.

No. 404

WYATT D. SHULTZ and CAROLYN SHULTZ, as Co-
Executors under the Last Will of Albert B. Shultz,
Deceased,

Petitioners,

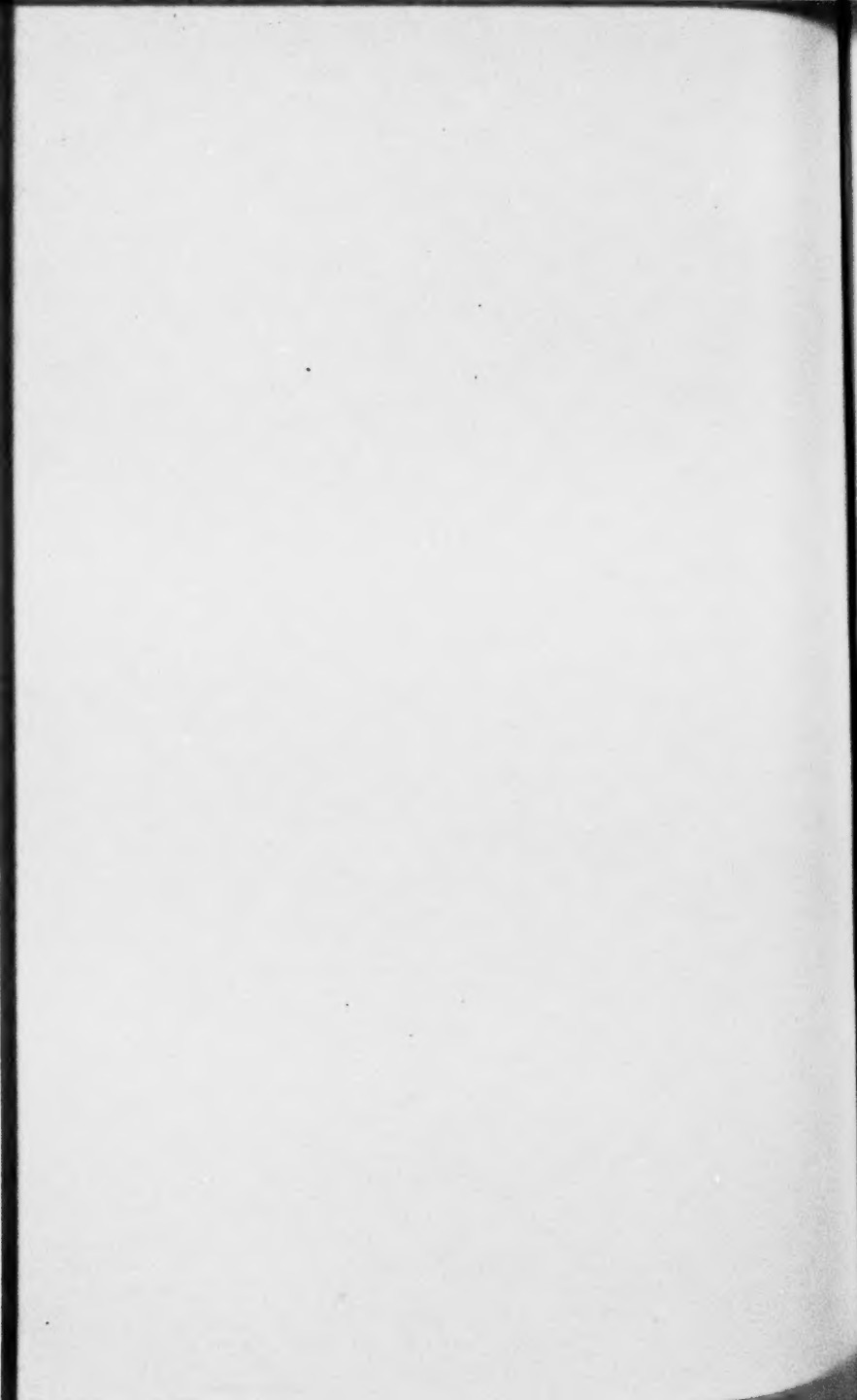
vs.

MANUFACTURERS & TRADERS TRUST COMPANY,
Individually and as Co-Executor under the Last Will
of Albert B. Shultz, Deceased, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT WITH SUP-
PORTING BRIEF.

ELLSWORTH C. ALVORD,
JULES C. RANDAL,
Petitioners' Counsel.



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Exhibits

Printed copies of original exhibits (duly filed with the clerk of this court pursuant to order of Hon. Harold P. Burke, D. J.) essential to passing on this petition are being submitted herewith for this court's convenience.

Such printed exhibits, grouped in chronological order, include:

1. Correspondence, July—September, 1928, between Bank and Eastman-Dillon, as follows—
Exs. P-54, P-520, (P-55 for identification), P-56, P-57, P-58, P-59, P-60, P-61, P-62.
2. Instruments and working notes drawn on Sept. 25 and 26, 1928—
Exs. P-98, P-99, P-100.
3. Cable correspondence, etc., with decedent between Sept. 28 and Oct. 2, 1928—
Exs. P-102a, P-104b, P-105a, P-106a, P-108.
4. Notice sent decedent on Oct. 11, 1928, agreement between Cooley and Bank's officers dated that day, and agreement supplemental thereto—
Exs. P-101a, P-112, P-113.
5. Depositary receipt issued by Bank as escrow on Oct. 22, 1928—
Ex. P-116b.
6. Receipts prepared by Bank for stockholders' signatures on Oct. 24, 1928—
Ex. P-542; Ex. C to Complaints.
7. Snyder agreement signed "as of" Nov. 1, 1928—
Ex. D-4.
8. Letter from Bank, dated Dec. 6, 1928 and receipt that day procured by it from decedent—
Exs. P-140, P-141.

IN THE
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October Term, 1942.

No.

WYATT D. SHULTZ and CAROLYN SHULTZ, as Co-Executors under the Last Will of ALBERT B. SHULTZ, Deceased,

Petitioners,

against

MANUFACTURERS & TRADERS TRUST COMPANY, Individually and as Co-Executor under the Last Will of ALBERT B. SHULTZ, Deceased, PERRY E. WURST, LEWIS G. HARRIMAN, FREDERICK B. COOLEY, GEORGE H. CHISHOLM, HARRY L. CHISHOLM, RALPH HOCHSTETTER, ANSLEY W. SAWYER;

and

THOMAS C. EASTMAN, HERBERT L. DILLON, HENRY L. BOGERT, JR., GILMER SILER, Individually as well as Co-Partners with JAMES P. MAGILL and MAURICE H. BENT, doing business under the firm name and style of Eastman, Dillon & Company,

Respondents.

Consolidated
Causes.

WYATT D. SHULTZ and CAROLYN SHULTZ, as Co-Executors under the Last Will of ALBERT B. SHULTZ, Deceased,

Petitioners,

against

MANUFACTURERS & TRADERS TRUST COMPANY, as Co-Executor under the Last Will of ALBERT B. SHULTZ, Deceased, THOMAS CANTWELL and GEORGE P. REA,

Respondents.

PETITION FOR CERTIORARI.

(Note: References to the record are shown as to volume and page respectively by roman and arabic numerals, i. e., [III 1865] is found in Volume III at page 1865 of the record. The causes were heard in the Circuit Court of Appeals and are being submitted here on the original exhibits. Printed copies of those exhibits essential to passing upon this petition are being furnished herewith.)

To the Honorable the Supreme Court of the United States:

The above named petitioners pray a writ of certiorari to review a final judgment [III 2348] of the United States Circuit Court of Appeals for the Second Circuit affirming a decision and judgment [I 202-47] of a chancellor sitting in the District Court for Western New York dismissing on the merits petitioners' complaints [I 7, 104] in consolidated causes charging fraud and conspiracy in the acquisition and execution of an agency.

The affirmance was based solely on a determination by the Circuit Court of Appeals (Circuit Judges Swan, Clark and Frank) that any claim for relief was barred by the New York statutes of limitation. The dictum of the New York case whose implication was thought to require this decision was considered so "incongruous" in result and its meaning so puzzling as to lead Judge Frank in effect to suggest this petition [128 F. (2d) 889 at 901-2; III 2346-7].

JURISDICTION.

This court's jurisdiction is invoked under Judicial Code, §240 (a), as amended by the Act of Feb. 13, 1925 [43 Stat. 938]. The judgment sought to be reviewed was filed July 6, 1942. [III 2348] Federal jurisdiction is based on diversity of citizenship. [Finding 1-a; I 203]

THE QUESTIONS PRESENTED.

This petition seeks the answer of ultimate authority to a question of self-evident importance:

First Question

Are federal courts of equity compelled in cases where their jurisdiction depends on diversity of citizenship to follow the case and statute law of the states in which they sit respecting limitations, when such state law conflicts with equitable principles and bars relief for fraud irrespective of the victim's ignorance of the fraud because of the fraud and concealment of the fraud's perpetrator?

The opinions below implicitly assume an affirmative answer to this primary question. Given the correctness of such assumption, the remaining questions are:

Second Question

Did the Circuit Court of Appeals err in failing to hold that New York Civil Practice Act (cited herein as C.P.A.) §53 governed every claim for relief herein, and in holding that §48 of said act governed every claim for relief?

Third Question

A corporate fiduciary obtains from petitioners' testator (then in Europe) and others authority to act as their agent to sell their stock upon a commission basis. The agent's authority from decedent is obtained through false written representations made to him by his financial counsellor and fellow-stockholder whom the agent has asked to convey its proposal. The agent then secretly intends to deal in the subject matter of the agency in joint account with others with whom it later splits its commission from the sale arranged by it.

The agent conceals from its principal and the principal is kept ignorant of the fact that before a notice of sale is sent him and as a part of the arrangements for the sale, the agent has arranged to share in the profits to be obtained on a resale—such fact and the subsequent carrying out of the arrangements constituting the charged violation of duty in the execution of the agency. The concealment is effected and maintained by oral and written statements which are false both in expression and in omission. The principal knew at the time the sale was consummated that his agent, a commercial bank, was lending the purported purchaser about 38% of the purchase price. He knew after the consummation of the sale that the agent's officers were participating in a syndicate, which, so far as the principal knew, was formed only after the termination of the agency, and the principal himself participated in such syndicate in the belief that it had been organized in good faith after the ostensible purchaser had acquired possession of and title to his stock.

Can the conclusion of law be sustained that decedent was on notice of the facts constituting the fraud so as

to start the running of the statute of limitations when decedent's knowledge did not include: a) the only facts making wrongful the agent's conduct in the execution of the agency; or b) any facts which made the agent's acquisition of the agency wrongful?

THE STATUTES INVOLVED.

The questions presented are concerned with the applicability of New York case and statute law respecting limitations, and whether the judgment herein is in conflict with such law. The statutes in question are quoted in pertinent part in Appendix A hereto (printed on inside back cover).

SUMMARY STATEMENT OF THE CASE.

The controversy at bar arises out of the sale in 1928 of all the stock of Houde Engineering Corporation (Houde), of Buffalo, N. Y., a manufacturer of shock absorbers. Upon such sale respondent Manufacturers & Traders Trust Company*—Houde's commercial banker—collected what it invariably referred to as a commission of 3% for acting in the self-described capacity of broker.** That commission amounted to \$126,318.33 [Ex. P-192; I 160, 164]

Petitioners are two of the three co-executors of Albert B. Shultz (decedent), who died June 3, 1932. [I 147-8, 153, 156] Decedent was a mechanic and inventor who founded Houde in 1919, and owned 46% of its stock. [I 12-13, 46] Although its president, he was unsophisticated in financial matters and had entrusted supervision of Houde's financial affairs to another stockholder (G. H. Chisholm), whom he trusted implicitly. [I 717, 722, 730]

Respondents are the Bank (sued individually and as de-

* This respondent, together with Krauss and Company—a nominee partnership composed of its officers—are hereinafter collectively referred to as the Bank. [Finding 2, I 203]

** For typical documentary evidence, see Exs. P-98/9; P-116b; I 42. Relevant and typical testimony is that of respondent Harriman (the Bank's president) in previous litigation: "Q. The M. & T. Bank was agent to sell the stock and were getting a 3% commission for doing it, weren't they? A. That is right. Q. And you were attempting to earn that 3% on behalf of the Bank? A. I was always interested in earning that 3%, yes, sir" (I 548); and again: "You knew that Mr. Rea had this brokerage agreement whereby the Bank was going to get 3% in the event that it was sold? A. Yes. Q. And you said you were anxious to have the 3% made? A. That is right" [I 548].

cedent's remaining co-executor) and numerous individuals, many of whom were the Bank's officers, or directors, or both. Other respondents include the partners comprising the brokerage firm of Eastman, Dillon and Company, who together with one Buffington (in charge of underwriting at their Chicago office [I 9, 85-6]) are hereinafter collectively called "Eastman-Dillon"; G. H. Chisholm (Chisholm), who operated Atlas Steel Castings Corporation with his brother H. L. Chisholm and one Wyckoff (a bank director)—each of the Chisholms owning 12% of Houde's stock [I 159, 164; II 1334, 1343-4; Ex. P-27]; A. W. Sawyer (law partner of one Dudley, another bank director), counsel for respondent Rea and the brokerage and securities division of the Bank headed by him. [I 785; II 831; I 9, 63-4]

The complaints—substantially identical in allegation—seek an accounting and damages. [I 7, 104] An accounting for the value of all property and money received as profits is sought from all respondents who did not pay value for such profits or who took them with notice of their tainted origin. In addition, damages are sought from those respondents charged with fraud in the acquisition or execution of the agency to the extent that an accounting for profits may not make decedent's estate whole. [I 30, 127] By separate answers [I 43, 62, 63, 83, 128], substantially identical in substance, respondents denied the existence of a fiduciary relationship, and asserted a number of affirmative defenses, including that of limitations.

After a trial to the court without a jury, Burke, D. J., held that there never was any fiduciary relation between decedent and the Bank, thus eliminating the entire basis for the suits. Had such premise been warranted, the holding of the District Judge that no respondent had been "guilty of any fraud, deceit, breach of duty or other misconduct" [I 245] was likewise proper, and the effect of the statute of limitations was not involved.

The Circuit Court of Appeals did not adopt Judge Burke's holding that there was no fiduciary relationship, for its decision rests solely on what it conceived to be the New York law of limitations, which was involved only if there was a fiduciary relationship.

Because of the nature of the Circuit Court of Appeals' decision, the facts are here discussed only to the extent required to make intelligible the issue raised by the plea of limitations. The basic facts are not in dispute on any substantial issue and appear almost exclusively from respondents' own admissions as evidenced by their testimony and the documents they created. Unless otherwise indicated, and obvious exceptions excluded, *assertions of fact made in this summary statement will be based on such admissions.*

One-Paragraph Resume of Facts.

Those admissions—undenied, unretracted, unexplained—establish: at the time the Bank obtained its brokerage employment it secretly intended to become interested in the subject matter of its agency; during the life of its agency it secretly arranged to acquire interests in the profits to be gained on a resale of Houde's stock, either through an immediate resale thereof, or, such quick resale failing, through the medium of a selling syndicate to be formed by the ostensible purchaser (a Bank director) whose services as nominee were to be rewarded by a \$500,000 syndicate participation—all of such arrangements antedating the dispatch to decedent of a written notice, false in every detail, to the effect that a binding sale had been effected; a supplemental arrangement provided that a quarter of the syndicate's net profits were to be reserved for the ostensible purchaser under the syndicate agreement, he to kick back the major portion of such reserved profit to the Bank's officers; the quick resale not being consummated, the syndicate was eventually formed as secretly prearranged, and used for the resale of Houde's stock with large resulting secret profits to the Bank's officers—all in strict pursuance of the prearranged formula for the division of such profits; weeks after these secret prearrangements, it was falsely represented to decedent that the ostensible purchaser (who had been represented as the independent and uncommitted owner of Houde's stock) had just decided to form such syndicate in which decedent was invited to and did participate. But all prearrangements made by the Bank and

its officers to form such syndicate and to share the profits nominally reserved for the ostensible purchaser were concealed from decedent by the Bank and its officers during his life time, and after his death were kept concealed from the courts which were considering other litigation involving Houde's sale by resort to false statements under oath. It is not claimed that decedent did know of these arrangements constituting the very core of the grievances for which redress is sought, and the trial court found that there was no evidence that he did. Clues to the existence of these arrangements first appeared in litigation arising after decedent's death. The suits at bar were filed shortly after the records in such litigation came to petitioners' notice. Documented detail follows.

The Evidence.

Between Sept. 6 and Oct. 18, 1928 decedent was away from Buffalo on a business trip to Europe. For nearly five weeks prior to his departure, respondent Rea (Vice-President in charge of the Bank's Brokerage and Investment Department) [II 992] had unsuccessfully sought to have him fix a price at which Houde's stock might be sold. Rea was then acting in behalf of the Bank, and, unbeknown to decedent, with Eastman-Dillon and a Chicago bank, Central Trust Co. of Illinois (Central), who were engaged in an "informal partnership" [II 941-2, 957] to realize profits from dealing in Houde's stock. The Bank had suggested "an attempt to get a definite price or option from" decedent [Ex. P-520], at the same time insisting that negotiations with decedent, who trusted it, be handled by the Bank, and the Bank alone, while the interest of Eastman-Dillon and Central remained undisclosed.*

Decedent declined even to negotiate with Rea in the absence of Chisholm, decedent's financial adviser and fiduciary, to whom he had entrusted all negotiations for the refinancing or sale of Houde. [I 730, 712, 728, 717, 36, 131]

* III ¹³⁴⁷ 6146; Exs. P-54, P-56/62, P-520; *v.*, Harriman's explanation of Ex. P-520 [I 560]. Earlier in 1928 decedent had summarily rejected as unconscionable a plan of refinancing sponsored by Central and Eastman-Dillon. Decedent's rejection was "strong" and "in very forceful language." He then told its proponents that it involved "outrageous profits," leaving them well aware of his personal disfavor. [I 717-9, 734; II 1368-72; Exs. P-48/50]

Chisholm had left Buffalo in June, 1928, and did not thereafter communicate with decedent until after his departure for Europe on Sept. 6. [I 709, II 1343]

Chisholm returned to Buffalo shortly after decedent's departure for Europe. By Sept. 24, after numerous negotiating talks with Rea, Chisholm had reached an agreement that the Bank should have an option on his stock at a price of \$4,000,000 for all of Houde's stock subject to the approval of the other stockholders. [I 719; II 1311-2] Apparently Chisholm had assured Rea that such price would be agreeable to all, for on the next day Rea was informing Eastman-Dillon over their private wire* that the other stockholders in Buffalo were not in accord with Chisholm's views and that he, Rea, had an appointment with all of them that afternoon in his office. [Ex. P-436]

At this meeting on Sept. 25 Rea told four of Houde's larger stockholders that he wanted an instrument to permit the Bank "to effect a sale" of their stock for \$4,000,000, the Bank to act as a broker in return for a 3% commission [II 1389; Ex. P-99]. The instrument which Rea drew and gave to the stockholders for their signature contained words of option, but explicitly provided that the Bank " * * * will act as a broker in this transaction" in return for "a commission * * * of 3%". [Ex. P-99] An argument about price ensued, Chisholm being in favor of fixing a price of \$4,000,000, and another stockholder, J. N. Scully urging a higher upset price. [II 1312-3]

Scully was not available to testify, and his deposition was read upon the trial. [I 327] It appears therefrom that Rea assured the stockholders at this meeting that a \$4,000,000 price would only be a minimum and that the Bank would attempt as their agent to get more if it could;† on obtaining the assent of those present to his proposal,

* From July onwards Eastman-Dillon and Central were in constant communication with the Bank—by mail, private wire and long distance telephone—and were kept fully advised as to Rea's activities [I 639; II 1435-6, 1449].

† As this statement is not supported by explicit admissions, it is proper to say that Scully was wholly undisputed by Chisholm and completely corroborated by decedent's brother, B. D. Shultz [I 357-9]. Scully, who had made a memorandum of the events of this meeting shortly after their occurrence [I 341], is not claimed to have been impeached; his relations with decedent were intermittently unpleasant [II 938; I 629, 329, 335, 342]. Far from being

Rea asked them and they agreed to recommend the Bank's proposal to Houde's absent stockholders, Chisholm then agreeing at Rea's request to communicate with decedent to obtain his approval to such proposal [I 332]—this is undisputed and in substance admitted [II 1473-4] by Rea.

Chisholm took Rea's instrument [Ex. P-99] to Houde's attorney (I. L. Fisk) that evening, and redrew it the following morning [II 1317] to incorporate the latter's suggestions designed to protect 1) Chisholm, who was about to sign it in decedent's behalf, in the event that decedent's approval could not be obtained; and 2) all the prospective signatories thereof in the event that some of Houde's stockholders might not assent to the Bank's proposal. [See Fisk's working notes, Ex. P-100]

Such instrument as thus redrawn was thereupon signed by Chisholm in decedent's behalf, as well as his own, and by the other stockholders who had been present at the meeting on the previous afternoon. This instrument [Ex. P-98], was dated Sept. 26 and thereupon delivered to the Bank. Such instrument retained Rea's language of option and statement that the Bank "will act as a broker in this transaction" in return for "a commission * * * of 3%".*

In the only opinion ever written wherein the Bank's relation to Houde's stockholders was drawn in question, the New York courts held Ex. P-98 to be "a form of agency" as a matter of law—and this without the benefit of the numerous admissions in this record upon which petitioners rest their case (254 N. Y. App. Div. 128; *cf.*, 249 *id.* 88, and pp. 27-8, *infra*).

At the very time the Bank was entering into its agency, it intended to realize profits from dealing in the subject matter thereof [I 640].

biased in petitioners' favor, decedent's brother was shown to have been co-operating with respondents and their counsel. [I 360, 369-70; III 2015] Rea, stigmatized by Frank, C. J., as "not worthy of belief" [III 2344, 128 F. (2d) 889 at 900], made admissions corroborating the essentials of Scully's testimony, discussion of which is omitted as without the scope of this petition.

*The only change made in this language was such as to emphasize the fact that the Bank was to have a commission only if it made a sale, thus disposing of respondents' argument that the commission ~~was~~ intended to be a rebate [*cf.*, Exs. P-98/100].

Rea was out of town on Sept. 26 [Exs. P-393/4], but upon his return on Sept. 28 conferred at the Bank with Chisholm on the subject of getting decedent's approval of the Bank's proposal. Both were anxious about Chisholm's action in signing decedent's name to Ex. P-98—"wanted specific confirmation of (Chisholm's) ability to sign" for decedent. [I 719] Thereupon Rea formulated and sent decedent a cable [Ex. P-102a] over Chisholm's name asking immediate authority to conclude a sale of Houde's stock for \$4,000,000 cash but failing to inform decedent that his name had been signed to Ex. P-98. [II 1394] Instead of cabling authority, decedent cabled a request that Chisholm telephone him in Paris. [Ex. P-104b] Chisholm complied on the evening of Sept. 29, but the telephone connection was so poor that all he could understand was that decedent wanted "full details" before taking action [I 720, 729].

Chisholm furnished "full details" in a lengthy cable [Ex. P-105a], prepared after a discussion with Rea to formulate its contents [II 1340; I 720-1], partly "quoting (Rea's) words". This cable was sent shortly after midnight on Sept. 30 (i. e., early on Oct. 1. [II 1320-3; Ex. P-106]), asking the decedent's authority by cable to permit the Bank to act as his agent to sell his stock at a minimum price of \$4,000,000 for all of Houde's stock, plus its accrued earnings from Aug. 31 in return for a 3% commission. That cable opened with the statement that

"Manufacturers Bank trying to get best price possible acting in our interests."

Chisholm was well aware of the fact that the Bank had no such intentions, *and so testified* [I 728-9]; that testimony is tantamount to a confession of fraud. Decedent cabled the requested authority on Oct. 2 [Ex. P-108]; Rea saw decedent's cabled consent. [II 1397]

Prior to Oct. 6, 1928, the Bank's officers believed that Houde's stock might be sold to General Motors Corporation at a price in excess of \$4,000,000 and accruals; it had "had quite extended negotiations" with General Motors, resulting in such an offer to purchase. [I 460, 469-70] Acceptance of this offer was precluded because the Bank's

officers knew that decedent would not permit a sale to General Motors [II 1110; III 1929]; because a direct sale would have limited the Bank's profit to its commission, and the Bank intended to obtain in whole or in part the difference between the ultimate resale price and that at which a sale had been authorized [I 640]; and because General Motors' price was not sufficiently high. [I 460]

At Rea's suggestion the Bank decided on Oct. 6 to approach the respondent Cooley*. Cooley was a Buffalo industrialist of reputedly large means, was the ostensible sole proprietor of New York Car Wheel Company of Buffalo (Car Wheel), and was so regarded by the local business community.** [I 11, 46] He was a director of the Bank [Finding 3; I 204]

Rea broached the matter to Cooley on Oct. 8, and on Oct. 10 brought him to a meeting with respondents Wurst and Harriman (the Bank's chief executives [I 8, 45]) at the latter's office at the Bank to discuss the purchase of Houde's stock; by this time Cooley knew that the Bank of which he was a director was to "act as a broker in this transaction" in return for a 3% commission. [I 646, 648, 751; III 1796-7] The arrangements then made were such as to confront decedent (who sailed from Europe that day [I 165]) upon his return with the appearance of the accomplished fact of a bona fide sale concluded in his absence.

Cooley felt that "the deal was too big for" him. [I 754] In order to make it "feasible for" him [I 754], the following arrangements were made whereby he was to act as "purchaser". The Bank would attempt to close an immediate resale to General Motors, and, that failing, would form a syndicate to relieve Cooley of at least seven-eighths of Houde's stock.† In the event of Cooley's death or dis-

*I 644-6. Cooley and Rea were intimates; although New York Banking Law, §222 (now §130) forbade the making of loans directly or indirectly by trust companies to their officers, Rea had obtained access to credit at the Bank through participation with Cooley and another director in syndicates financed on Cooley's paper [I 749-50; Ex. P-150].

** Cooley controlled Car Wheel through ownership of one-third of the stock of Cooley Trading Co., Inc., a company trading in securities and wheat, which had among its assets three-quarters of Car Wheel's stock [III 1825-6, 2235]. Cooley and these companies are collectively referred to herein as Cooley.

† *I. e.*, "to relieve (Cooley) of approximately the amount of \$3,500,000.00 of a total purchase of \$4,000,000.00." [Ex. P-112].

ability prior to the syndicate's formation, the Bank's officers were to succeed to all rights in Cooley's "purchase" and save him harmless from any liabilities thereunder. The Bank's officers were "personally to take a substantial part of the purchase on" the syndicate. [I 753-4; III 1841-5, 1800, 1805-6; I 774, 779; Ex. P-112] Of these provisions, all but the last were embodied in a writing [Ex. P-112] signed by Cooley and the Bank's officers on the following morning, Oct. 11. [I 754-5; III 1803-5, 1928] This writing [Ex. P-112] was placed in the private files of the contracting parties. [I 507] Respondents have never claimed in their pleadings or otherwise that decedent knew of this document, or the arrangements evidenced thereby, and the trial court found that there was no evidence that decedent had such knowledge. (Finding 84 [I 221]; v., p. 15, *infra*.)

The arrangements concluded on the evening of Oct. 10 were made in complete disregard of common honesty. Although the Bank's officers knew that Houde's stock was worth more than the upset price of \$4,000,000 and accruals [I 453, 460, 481], they did not ask Cooley to pay one cent more than that minimum. [III 2279] The reason for this is not left to inference; as Wurst testified: "If we had not thought there was a profit in it, it would not have been bought". [I 453] Indeed, the realization that "we could not be principals and agents both" was offered as Wurst's *explanation* of why Cooley was obtained as the "buyer" of stock which "we thought * * * a good purchase" [I 475, 481] for immediate resale to General Motors. [I 754-6] These avowals made the situation so clear that respondents' own counsel, speaking of the Bank's officers, informed the trial court that "naturally they went into this for a profit". [I 255]

After Cooley and the Bank's officers had signed Ex. P-112, the Bank mailed decedent a notice of sale dated Oct. 11 [Ex. P-101a], advising that "we have secured as a purchaser the New York Car Wheel Company of this city, which has agreed to purchase said stock (*i. e.*, all of Houde's stock) upon the terms of our option (*i. e.*, Ex. P-98) and has made available in our hands the sum of \$4,000,000 therefor". Cooley at once went to Houde's plant where he was introduced as

"the new boss" and so treated. [III 1805, 2208]

This notice of sale was drawn by respondent Wurst (the Bank's Executive Vice-President) and signed by respondent Cantwell (Vice-President and head of the Bank's Trust Department as well as a partner in Krauss and Company). [III 1932; I 374-5; II 993]

Every statement of fact therein made was false. Neither Cooley nor Car Wheel had been secured as a purchaser for no compliance with the Statute of Frauds (New York Personal Property Law, §85) had been made. [I 745-6] In no real sense was Cooley the purchaser for his interest in Houde's stock was so small and the Bank's control thereof so complete as to constitute him a mere nominee. Neither Cooley nor Car Wheel had \$4,000,000 on deposit on Oct. 11 [I 749] and no loan in that amount had then been approved [I 769], so that even accepting the explanation made by respondents that "available in our hands" meant either that that sum was on deposit or that a loan in that amount had been approved [I 457-67], the notice was wholly false. If decedent understood the notice of sale to mean that a loan had been made, as its author intended that he should [I 457-67], decedent was entitled to believe that such loan was *bona fide*, made in the regular course of the Bank's business, and involved no breach of fiduciary duty.* Rea, Harri- man and Cooley knew the contents of this notice and knew it was being sent. [I 651, 769; II 1107; III 1845, 1932] Such notice made tender of the full amount of the purchase price allegedly but not in fact "available", thus enabling the Bank to claim, as it subsequently did claim, that title to Houde's stock passed on Oct. 11, thus stopping the running of accruals at that date.

Very early on Oct. 11, and hours before Ex. P-112 was signed, the Bank had set arrangements in train by long distance telephone to have the manager of General Motors' subsidiary manufacturing shock absorbers come to Buffalo on the following day to inspect Houde's plant. [I 650-1; II 1195; III 1896]

* "Thus, an agent employed to sell may properly loan money to the buyer to complete his purchase * * *" (Restatement of Agency, §391, Comment b, p. 883).

It was only after plans for Houde's resale projected on the night of Oct. 10 were thus being carried into execution that Ex. P-112 was signed on Oct. 11. [III 1932] This instrument contained no reference to plans for the financing of Houde's acquisition also arranged on the night of Oct. 10. Cooley had no money with which to purchase.† Harriman knew this without being told and had "volunteered" [I 543] to have the Bank lend Cooley all money required to clear the deal upon his demand collateral note secured by Houde's stock and "six hundred odd thousand dollars of additional collateral," suggested by Harriman as "a fitting amount."*

Time had not sufficed on Oct. 10 for Cooley and the Bank's officers to "talk out" the details of their scheme. [I 774-5] A supplemental agreement was accordingly made—so respondents claim—on Oct. 13, when Cooley and the Bank's officers "came to an understanding" [I 747], whereby 80% of the profit on a quick resale to General Motors was to be paid over to the Bank, its officers and securities affiliate. Alternatively, a quick resale failing, the syndicate theretofore arranged was to be formed to take over Houde's stock, in which syndicate Cooley, the Bank, its officers and securities affiliate, and "such other individuals and corporations, as we shall agree upon, including—" Central and Eastman-Dillon "who were originally interested in refinancing" Houde "will be permitted to participate." In addition, 25% of the syndicate's net profits was to be retained by Cooley as his apparent profit, but he was to kick back 60% of this sum to the Bank's officers [Ex. P-113]. Cooley's original underwriting position of \$500,000, as provided by Ex. P-112 (see last note on p. 11, *supra*), was discussed and left undisturbed [1774] by the parties to the "understanding".

This understanding was reduced to a writing, not produced by respondents because allegedly [II 3031] lost or

† III 1845-6; see proof as to accounts of Cooley and his companies at the Bank at I 523, 570-1.

* 550. \$600,000 was 15% of \$4,000,000, the minimum margin prescribed by New York Banking Law, §103 (then numbered §190); the "odd" thousands of dollars were stipulated so as to margin the additional purchase price represented by Houde's accruals, then still unknown.

stolen from the Bank! An alleged copy bearing date Oct. 13 [Ex. P-113] is in all respects *in pari materia* with Ex. P-112, and, as pointed out by Frank, C. J., was "but incidental to the previous secret agreement (*i. e.*, Ex. P-112)". [III 2342; 128 F. (2d) 889 at 899]

These arrangements, partially evidenced by Exs. P-112/3, were carried out to the letter. Their existence constitutes the core of petitioners' grievances, and without them neither decedent nor petitioners had cause for complaint.

Burke, D. J., found that there was no evidence that decedent knew of their existence [Finding 84; I 221], and Judge Frank points out that they were "elaborately concealed" from decedent. [III 2341-2; 128 F. (2d) 889 at 899] Respondents were fully aware of the significance of these fraudulent arrangements, not scrupling to resort to false statements under oath to conceal their existence from the courts in previous litigation involving Houde's sale; indeed, it appears in the suits at bar that respondents sought to perpetrate a fraud upon petitioners and the trial court, in an effort to obtain summary judgments, submitting affidavits on the subject known by them to be false to the effect that there never had been an underlying agreement to divide the profits upon a resale.*

Decedent reached Buffalo from Europe on October 18. [I 376] He then protested the sale of his stock, "insisted" that he would not go through with it and expressed dissatisfaction with the price. [I 465, 463]

Decedent's protest at the sale and declination to make delivery of this stock was founded on his suspicion, expressed to Wurst, that Cooley was not the actual purchaser, but a mere dummy or straw man for General Motors Corporation, to which, as the Bank's officers well knew [II 1110; III 1929], decedent was unwilling to sell. [I 377, 334-5] Wurst assured decedent that Cooley and not General Motors was the actual purchaser of Houde's stock.† While General Motors was not the actual purchaser, it has already

* A few instances are cited by Frank, C. J., in Note 7 to his opinion [III 2342-3; 128 F. (2d) 889, 899-900].

† I 377. The facts in this paragraph stated were in substance admitted in respondents' "Main Brief" in the District Court, pp. 55-6, and at p. 33 of their brief in the Circuit Court of Appeals.

sufficiently appeared that the statement that Cooley was the purchaser was but a half truth, if not wholly false, serving to conceal from decedent the Bank's interest in the transaction.

Faced with the alternative of a lawsuit or making good delivery of his stock, decedent decided to and on Oct. 22 did deliver it,* as did all of Houde's other stockholders, to the Bank which was ostensibly acting as a depository or escrow agent to deliver the stock to Cooley against payment to the stockholders of their ratable share of the purchase price, less the Bank's 3% commission. [I 455, 536; III 1940] The Bank's depository receipts (a sample is Ex. P-116b), drawn by Wurst and dated Oct. 22, stated that the Bank was to collect its 3% commission and amounted to representations that that commission had been duly earned. (*Wechsler v. Bowman*, 285 N. Y. 284) But, as the facts already stated make manifest, the Bank had not only earned no commission, but had already defrauded decedent and was in process of perpetrating further frauds upon him.

Decedent also learned on Oct. 22 that Cooley was proposing to organize a Delaware Corporation to be known as "Houdaille Corporation" for the primary purpose of protecting the name *Houdaille*, under which Houde's product was known. [II 819; Ex. P-332A]

On Oct. 24 all stockholders except decedent received checks certified by the Bank on Cooley's account in full of their respective shares of the purchase price of \$4,000,000, plus Houde's accruals computed to Oct. 11 (\$210,611)—the day on which a binding sale had purportedly been made. [II 160, 164; Ex. P-117] Decedent did not want to accept more than \$250,000 out of a total of \$1,884,091 due him (his ratable share of the purchase price, less the Bank's 3% commission), because he would have been unable to obtain bank interest thereon during the middle of a month under the local clearing house regulations.† [I 478-9, 483,

* Making good delivery required decedent to dispose of a claim asserted in his absence by the Scully brothers, also stockholders in Houde, the gist of which was that decedent had wrongfully received stock which was in truth treasury stock. [I 800]. Decedent settled this claim for \$50,000 [III 1537-9].

† This interest was substantial—more than \$1200 a week.

490; II 1132] Cooley agreed to pay decedent 4% interest on the deferred portion of his purchase price. Decedent and the other stockholders signed receipts prepared by Wurst, each of which refer to the deduction by the Bank of its "commission", amounting in total to \$126,318.*

These receipts constituted representations (albeit false, as already noted) that the Bank was entitled to collect its commission. *Wechsler v. Bowman, supra*.

Decedent's receipt (Ex. P-542) had an addendum thereto signed by Wurst for the Bank whereby the Bank undertook to see that decedent received the balance of his deferred purchase price on demand; such balance amounted to \$1,634,091 [I 160, 164], 32½% of the Bank's capital. [I 304] The Bank's liability on such guaranty was not entered on its books. [II 961; I 288-90] The utmost which these facts could establish is that by this receipt, which Clark, C. J., designated as "a highly significant document" [III 2330], decedent was advised that Cooley was being financed by the Bank to the extent of 38% of \$4,210,611, the total purchase price of Houde's stock. As previously stated (p. 13, *supra*), such fact, had it been true, would have been wholly innocent, and no notice to decedent of the frauds being perpetrated on him; indeed, as respondents urged below, for an agent to sell to lend the purchaser money to consummate a sale is in furtherance and not in derogation of agency duty.

The payments to Houde's stockholders on Oct. 24 totaled \$2,500,200, and were made by checks prepared by Wurst and certified by the Bank on Cooley's account, resulting in what was characterized on the Bank's books as an overdraft of \$2,492,943 [Exs. P-155A, 158C, 162/3, 164A/B; III 1940]. This overdraft was covered by the Bank's issuance of a \$2,500,000 credit to Cooley, secured by his demand collateral note pledging Houde's stock (already in the Bank's possession as depository) and miscellaneous collateral valued at \$636,909 [Exs. 153A/J]—exactly 15% of Houde's purchase price with accrued earnings.† (See last note on p. 14, *supra*.)

* V., receipts annexed to the complaints as Exs. C and D [I 42-3].

† This loan was made in the teeth of New York Banking Law §190 (now §103) requiring loans to directors to be first approved by a majority of the directors.

The following facts relate to the manner in which profits were realized from the fraudulent transactions, and under circumstances which demonstrate the "entanglements" at bar which call for a "discovery and accounting" (Cardozo, J., in *Buffum v. Barceloux Co.*, 239 U. S. 227 at 235, and *Falk v. Hoffman*, 233 N. Y. 199 at 203); they make it obvious that no remedy at law was ever available to decedent or to petitioners comparably adequate, certain and complete to that afforded in equitable suits for an accounting.

On Oct. 15, 1928, plans had been set in motion by the Bank, Eastman-Dillon and Central to organize a corporation to hold Houde's stock and make a public offering thereof.† On the eve of this public offering Eastman-Dillon withdrew from the joint venture [II 947-8], advising the Bank of this decision by a letter [Ex. P-74] dated Oct. 31, 1928, which stated that it knew of a purchaser (actually a promoter named Barnes [III 1657], uncovered by it on Oct. 16 [Ex. P-404]), who might be interested in buying Houde were the Bank interested in discussing its sale. This letter concluded with a reminder that "an equitable and satisfactory division of the commission derived from" Houde's sale was expected.

Eastman-Dillon's letter of Oct. 31 was acknowledged by return of mail, Rea writing [Ex. P-75] that he would be glad to discuss the sale of Houde with any prospect whom Eastman-Dillon had in mind. At the same time a syndicate agreement theretofore drawn by Sawyer [Ex. P-336; II 809-11] was revised with the assistance of Wurst and the advice of Harriman. [I 541, 532] Such syndicate agreement [Exs. D-4, D-8, P-178/9] was drawn for execution "as of" Nov. 1; its provisions are summarized below.

Upon receiving the Bank's letter [Ex. P-75], Eastman-Dillon telephoned Barnes and thereafter, on Nov. 2, wrote him confirming their telephone understanding "that in the event a deal is consummated" Eastman-Dillon, Harris-

† I 803, 790; III 1804; Ex. P-402. Cooley's inability to relate what these plans were underscores his nominee position throughout these transactions [III 1908, 1880-11]; he was obliged to refer all questions on the subject to Rea, stating: "Those details were not in my hands" [I 760].

Small & Company, (Detroit investment bankers who were backing Barnes—hereinafter called “Harris-Small”) and Paul H. Davis & Company (investment bankers of Chicago) “will have an equal interest in the financing”. [Ex. P-78] Eastman-Dillon wired, and on Nov. 2 wrote the Bank that Barnes or a representative of Harris-Small would call on Rea during the following week. [Ex. P-77.]

The syndicate agreement signed “as of” Nov. 1 was drawn in strict pursuance of the fraudulent arrangements made by Cooley and the Bank’s officers during the life of the agency: 25% of the syndicate’s net profits was thereby reserved to Cooley. Needless to say, the syndicate agreement did not disclose that this provision was inserted in pursuance of the dishonest arrangements (partially evidenced by Exs. P-112/3) concluded before decedent returned from Europe; nor did the syndicate agreement disclose the interest of the Bank’s officers in the profit ostensibly reserved for Cooley alone. The ostensible purpose of the syndicate was to take over Houde at Cooley’s cost, and thereupon operate and supply it with additional working capital. The term of the syndicate was to be one year with provision made for extending its life through a second year. The agreement provided for three syndicate managers, naming Cooley and Harriman as two of them; syndicate managers were to be permitted to become subscribers. Profits were to be divided among the subscribers ratably to their participations—after one-quarter thereof had been paid to Car Wheel “or its assigns” (*i. e.*, to Cooley its ostensible proprietor). The Bank then intended [Ex. P-75] that decedent should continue to act as Houde’s production executive, together with Cooley,* who had been posing as Houde’s owner since Oct. 11.

Subscriptions to this syndicate were solicited among the directors of the Bank immediately following a regular meeting of the Bank’s board in the Bank’s directors’ room

*III 1819-20, 2208. The Bank knew that Cooley, who had spent his life in the foundry business [III 1824, 1908], had had no experience in the manufacture of precision machinery [I 696].

on Nov. 7. [I 538, 562-3; II 1154-6] This was four weeks after the Bank had supposedly effected a *bona fide* sale to Cooley, and two weeks after that sale had been consummated. Decedent was asked to and did subscribe to this syndicate; he knew that opportunity to subscribe to this syndicate, ostensibly controlled by Cooley, was being given to the Bank's directors, decedent's signature being preceded by those of some nine other directors of the Bank, including Wurst and Harriman. [Ex. D-4]

But decedent did not know that Cooley was essentially a nominee, and decedent's subscription to, and subsequent participation in the syndicate was under the impression fraudulently created by respondents on Oct. 11 [Ex. P-101a], and maintained by them on Oct. 18 [see p. 15, *supra*], that Cooley was an independent and *bona fide* purchaser of Houde's stock. Had this been true, as respondents succeeded in making decedent believe, decedent could have perceived no impropriety in Cooley's permitting any one whom he pleased to participate in a syndicate to take over his purchase.

This fraudulent pretence was continued by the Bank when the syndicate was formed and allotments of participations made therein on Nov. 14. [II 1046, 1255-7; III 1880, 2009; *cf.*, II 1260; I 550-52] On that day letters of identical tenor [II 1164] were sent to each syndicate subscriber advising each of the amount allotted to him in the syndicate "with the approval of Mr. Cooley." [Exs. P-535, 193A (quoted Finding 176, I 232-3)] In point of fact, as appears in the next paragraph, Cooley was not even in Buffalo on the day allotments of participation were made, the same day that a resale of Houde's stock for \$6,000,000 had been arranged. Wurst drew these letters of allotment, signing them with the names of the syndicate managers [III 1956-7]; although neither he nor Rea were syndicate managers, both participated in making the allotments. [I 762-4] Twenty-three of the twenty-seven individual allottees were officers or directors of the Bank. Sawyer, the Bank's attorney in these transactions, was an allottee who subsequently transmitted part of his profit to another Bank director, his partner Dudley. [I 860-1] These allotments

totalled about 92% of the \$4,250,000 syndicate. The Chisholms were secret participants in the syndicate profit, although not allottees, their partner Wyckoff having "given" them a portion of one of his allotments. [I 488-9; II 1067, 1332] There were but three other syndicate allottees: decedent, one Jackson, an automotive accessory manufacturer, and a large stockholder who was the father of a Bank director who did not subscribe. [I 166-74] Decedent knew that Cooley was associating Jackson in the enterprise, for he attended a meeting of Houde's board on Nov. 7, at which 1) Jackson as well as Cooley and Harriman were elected directors of Houde; and 2) Cooley, as Houde's "sole stockholder," assented to a by-law amendment creating a new chief executive office, that of Chairman of the Board, to which he was forthwith elected. [Ex. D-28]

On Nov. 14 Barnes and one Allington, a partner of Harris-Small, arrived in Buffalo to keep an appointment with Rea arranged by Eastman-Dillon. [Findings 178-82; I 233-5; Exs. P-419/22] By that evening Allington had informed his lawyer over the long-distance telephone that: 1) Houde was to be acquired for \$6,000,000; 2) Houde's stock was to be held by a new corporation to be organized under the laws of Michigan, known as Houdaille Corporation—hereinafter called Houdaille (Mich.); 3) the stock of Houdaille (Mich.) would be listed and publicly offered within a period of one week. [III 1638, 1607-8, 1641-2] During the following five days Houdaille (Mich.) was organized [Ex. P-565], listing and blue-sky law applications for the sale of its stock prepared [Exs. P-569/70], and letter contracts submitted whereby Harris-Small ceded—pursuant to the terms of Eastman-Dillon's agreement of Nov. 2 [Ex. P-78]—two-thirds of its purchase in equal shares to Eastman-Dillon and Paul H. Davis & Company. [Exs. P-483/4, P-488] Activity no less brisk was proceeding in Buffalo. Cooley returned from New York [Ex. P-373] post-haste, conferring with his counsel, Mr. Morey, on Nov. 15 on the subject of tax avoidance on his anticipated profit, on the next day transferring his entire syndi-

cate allotment to his children. [Exs. D-77, P-170; III 1884-5, 2025; I 168, 171] Wurst took similar action on Nov. 15. [Ex. P-176; I 168, 171] On Nov. 15, Sawyer took steps to prepare his bill [Ex. P-327], which was dated Nov. 16, and amounted to \$10,000 exclusive of disbursements. [II 860] Rea transferred almost all of his anticipated profit to Rea & Co., a tax avoidance partnership composed of his wife and himself, formed by Sawyer. [I 612; II 1463, 1502-3]

On Nov. 20, 1928, Allington returned to Buffalo and signed a formal contract for the purchase of Houde's stock from the syndicate managers. [Ex. B to Cpts., I 37-41] The syndicate had no title to the stock, nor any enforceable agreement for its purchase [I 771-2]; it never had physical possession thereof, **nor funds** with which to purchase [II 1258; I 170-1], and was without any capital. This embarrassment was obviated by having Cooley "individually and as holder of ~~the~~ record" subscribe a postscript to the contract "to signify his assent to the provisions thereof and his agreement to their performance." [I 42]

On the same Nov. 20, the Bank sent Central and Eastman-Dillon checks for \$15,000, the letter to the latter stating that the remittance came "out of our commission for the sale of" Houde's stock [Ex. P-86]. Eastman-Dillon acknowledged this payment as "representing *our interest* in commission for the sale of" Houde's stock [Ex. P-96]. The Bank's transmittal letter [Ex. P-86] shows that Eastman-Dillon had also sought a share of the Bank's profits on the resale.

Decedent knew that Houde's stock was shortly thereafter acquired by Houdaille (Mich.) and that Harris-Small had made a public offering of that corporation's stock. Decedent purchased stock of the latter corporation from Harris-Small, continuing as Houde's president until August 1929; at that time he resigned his office with Houde, then selling his stock in Houdaille-Hershey Corporation, successor by consolidation to Houdaille (Mich.), also then resigning as an officer and director of Houde's holding corporation, Houdaille-Hershey.*

* Exs. D-40, D-61, P-262/3; III 1596, 1627. The statement in the opinion of Clark, C. J., [III 2332; 128 F. (2d) 889, 894] that decedent continued as an officer and director "for some years" is an obvious error, is supported by no evidence and is opposed to the only evidence [v., exhibits just cited].

(But there is no evidence that decedent knew that Harris-Small was a purchaser actually put forward by Eastman-Dillon, that Eastman-Dillon had a one-third interest in Harris-Small's purchase, that Eastman-Dillon had been in joint account with the Bank, and had claimed and received from the Bank a portion of its brokerage commission—all of which facts were sedulously concealed from decedent.)

Before any payment for Houde's stock was due from Harris-Small, the stock of Houdaille (Mich.) had been listed on the Chicago and Detroit stock exchanges and publicly offered. [III 1643] The ostensible offerors were Harris-Small and Paul H. Davis & Co., information as to Eastman-Dillon's participation in the offering being deleted from publicity statements and not appearing in the financial chronicles [III 1644-5, 1789; Ex. P-451]. On the day of the public offering (Nov. 22) the stock of Houdaille Corporation, for which Harris-Small had agreed to pay, but had not in fact paid \$6,000,000, was selling for approximately \$14,000,000 on the stock exchanges where the market was free and open. Eastman-Dillon's gross merchandising profit in cash on this transaction substantially exceeded \$200,000; the value of the Houdaille (Mich.) stock received by it was then largely in excess of \$500,000.*

The trial court excluded proof of damage until the issue of the right to an accounting had been established [II 1042]. Therefore the above figures do not represent net profit, nor do they include the profits of a syndicate entered into between Harris-Small, Eastman-Dillon and Paul H. Davis & Co. for the secondary redistribution of the stock of Hou-

* II 989; III 2177. The exhibits (*c. g.*, Exs. P-425/6, P-427D, P-483, P-488, P-565, P-569/70) show: Houdaille (Mich.), organized by the offering syndicate [III 1654], agreed to sell 108,000 shares of its Class A preferred (convertible into common, share for share) and 148,000 shares of its Class B common stock to Harris-Small in return for all of Houde's stock (about to be acquired for \$6,000,000) plus \$480,000 in cash. After setting aside 10,000 shares of common for the management of Houdaille (Mich.) Harris-Small sold one-third of its preferred and common to Eastman-Dillon for \$2,160,000, and a like amount to Paul H. Davis & Co. for the same price. Each of the three firms then publicly offered and sold 36,000 units (consisting of one share of common and one share of preferred) of Houdaille (Mich.) stock at \$66 a unit for a total of \$2,376,000, each retaining 10,000 shares of common stock to boot. On the first day of trading the preferred closed at \$53.50 a share, the common at \$56.50 a share.

daille Corporation of Michigan. [v., Ex. P-460] Nor do they include the profits realized by Rea, Buffington and the individuals comprising Eastman-Dillon's firm from private dealings in Houdaille stock [I 695; III 2154; Ex. P-569].

On Dec. 3, the Buffalo syndicate received \$6,000,000 by telegraphic transfer in full payment for Houde's stock [Exs. P-183/5, P-267, P-515]. Wurst then prepared the only account of its transactions in his own hand [Ex. P-192] showing payments made and to be made from this fund. If limitations do not bar relief, this account must be recast eliminating large items of syndicate expense* improper because of the unlawful character of the transactions at bar after giving effect to the return (tendered in the complaints [I 30, 127]) of decedent's syndicate profit.

On Dec. 5, 1928 decedent and all other syndicate participants were sent letters transmitting to them checks for their ratable share of three-fourths of the net syndicate profit upon the resale to Harris-Small. [Exs. P-517, D-41, quoted in Finding 200, I 238] Such letters (identical in form [II 1171]) set forth the price realized on resale, a rough summary of the syndicate expense, and the syndicate's net profit, and stated further:

"By the terms of the underwriting agreement† (*i. e.*, the syndicate agreement) Mr. Cooley receives 25% of this sum, which amounts to \$436,066.88 * * *" (parenthetical matter interpolated).

Pursuant to the secret arrangement summarized above, Cooley did not retain this sum. He secretly paid exactly 60% of it (\$261,604.12) to the Bank's officers (or their wives, or assignees), obtaining cashier's checks for that purpose from a New York bank (where he had no account)

* E. g.—payments to Sawyer for services in assisting in consummating a fraud on decedent [Ex. P-327], to auditors for services in setting up financial statements for use on the proposed financing in October [Ex. P-364], to the Bank for interest on a loan made to consummate a fraud [Ex. P-192], etc.

† Purporting to quote this sentence, Judge Clark's opinion states "By the terms of the *underlying* agreement Mr. Cooley receives 25% of this sum." This typographical error effects an unfortunate distortion. Decedent knew of the seemingly innocent underwriting agreement (Ex. D-4), but was kept in ignorance of the underlying agreements (partially evidenced by Exs. P-112/3) which would have warned him of the fraud.

selected by said officers for the avowed purpose of maintaining "a little privacy" and avoiding "gossip" and "bad feeling" [III 1862-6, 2005] Subdivision 2 of Judge Frank's opinion [III 2342; 128 F. (2d) 899] is devoted to an account of these "unpleasant evasive" methods, redolent with fraud, used to conceal the division of spoils between Cooley and the Bank's officers.

Meanwhile there had been placed on deposit for decedent with the Bank the deferred portion of his purchase price, together with interest thereon [Exs. D-50/1]. Wurst, through whom all these matters cleared [I 447], represented to decedent in writing that these moneys had been paid him by Cooley. [Exs. P-140/1]. In point of fact, these payments were made by Harriman's checks [Ex. D-50] on the syndicate account, such checks and all other checks on the syndicate account being signed by Harriman alone. [II 1171]

In summary: first, there is not alone no evidence that decedent knew of the Bank's arrangements with Cooley made during the life of its agency, the record conclusively establishes that those arrangements were consistently concealed from decedent, with repeated resort to fraud (*e. g.*, on Oct. 11, 18, 22 and 24) to maintain that concealment; second, without knowledge of such arrangements, every fact known to decedent was consistent with absolute honesty and fair dealing upon the part of the Bank, particularly in view of Wurst's assurance to decedent on Oct. 18 that Cooley was the actual purchaser of decedent's stock.

Respondents' Testimony after Decedent's Death Supplies Clues to their Frauds.

Decedent died on June 3, 1932, reposing complete trust in the Bank, which he named as one of his executors and trustees [I 147-8, 153]. It had long had physical custody of his securities [Ex. D-54]. Respondents themselves have urged below that decedent's trust in the Bank and its officers continued unshaken during his lifetime.

Clues to the frauds complained of did not come to light until long after decedent's death. Since the frauds complained of were of a self-concealing character, clues to their

existence came from the only persons who knew of them—the perpetrators thereof.

The first leak came in May, 1933, when Wurst gave a deposition as the principal witness for the Chisholms in an income tax controversy.* That deposition [I 445-92] was received on the trial herein as an admission against Wurst and the Bank [I 446]. Wurst's testimony thereon, given in frank and explicit detail,** was taken in the privacy of the office of the Chisholms' lawyer (Morey), who was also counsel for Cooley and a director of Car Wheel [I 445; III 2027]; as a lawyer experienced in tax matters [I 465, II 959], Wurst might well have assumed that there was little chance that his deposition which was to be filed in Washington would ever come to the attention of any aggrieved stockholder.

The disclosures made in that deposition might never have come to light had not Cooley quarreled in April, 1934, with one Goetz, an officer, director and substantial stockholder of Car Wheel. Beginning in May, 1934, much litigation ensued between Goetz and Cooley, the principal subject matter of which was Goetz's claim that Cooley's profit on the Houde transactions belonged in equity to Car Wheel [I 251-3, 262-3]. The uncontroverted fact is that during the month which elapsed between Cooley's quarrel with Goetz and the institution of the first of such suits, Car Wheel burned its books and records in large quantities [I 264-5].

* This dispute involved the question of whether the Chisholms had successfully postponed the incidence of the income tax upon their anticipated profit in the Houde transactions subsequent to receiving the notice of sale of Oct. 11 [Ex. P-101a]. The Chisholms had thereafter formed a tax avoidance partnership, contributing their stock in Houde as its sole capital. This partnership made delivery of the stock and received payment therefor on Oct. 24. The Chisholms took and had to take the position that the relation between the Bank and themselves was one of option, and obtained a stipulation of facts to that effect [III 2212-3], upon which the controversy was determined adversely to them in the United States Board of Tax Appeals (29 B.T.A. 1334). This determination was reversed by the Circuit Court of Appeals for the Second Circuit (79 F. (2d) 14). This court refused certiorari (296 U. S. 641).

** Wurst had then had a number of occasions to refresh his recollection, not the least of which was a controversy involving the taxability of the moneys paid him out of the 25% profit ostensibly reserved for Cooley [Ex. P-583,—III 1963, 1912-3].

The Goetz litigation was succeeded in late 1934 by suits against the Bank brought by certain of decedent's fellow-stockholders in Houde who by that time had discovered what had transpired. These suits, seeking "damages for breach of a contract of agency or brokerage" (249 N. Y. App. Div. 88 at 89), were consolidated and brought to trial in March, 1936. [I 258] It was not until the eve of this trial, which resulted in a non-suit, that petitioners first heard that the Houde transactions had been called in question. [II 867-9]

Petitioners promptly sought information from the Bank, which stood in fiduciary relation toward them [I 147-8, 153]; they were repeatedly assured by the Bank, both orally and in writing, that there was no merit in law or fact to any claim that it had been guilty of wrongdoing.†

Judgment on the non-suit in the Bank's favor was reversed and a new trial awarded in late 1937 (249 N. Y. App. Div. 88). Petitioners at once sought counsel and in less than a month employed their present attorney. [II 871] Explanations were sought and investigation begun. [II 872-9; Ex. P-511]

Although Wurst (falsely [III 1989]) informed petitioners that all of the pertinent facts and circumstances had been developed in the trial of one of the Goetz cases (in which the Bank, Wurst, Harriman, *et al.*, had been defendants), the explicit written explanations asked of him were not forthcoming, and petitioners and their counsel attended the second trial in May, 1937, of the actions brought by the other stockholders. [II 872; Ex. P-511]

The outcome of this second trial was a verdict directed in the Bank's favor. The disclosures there made were such as to impel petitioners to ask Wurst for further explanations, and when these were not forthcoming, the Bank's resignation as their co-executor. [II 876-8; Ex. P-511] Shortly after the exhibits upon said second trial became available to them, petitioners started proceedings in the New York courts (early in 1938) to remove the Bank as their co-executor. [II 879-80]

† I 54-5; II 870; cf., the Bank's letters of Feb. 23 and Mar. 8, 1937 [Ex. P-511].

While such proceeding was awaiting decision,* petitioners obtained leave to and did file a brief *amicus curiae* upon an appeal taken by decedent's fellow stockholders from the judgment entered on the verdict directed in the Bank's favor on the second trial of their actions for breach of contract. In such brief petitioners argued that Ex. P-98, the instrument of Sept. 26 (upon which appellants in said litigation relied [Exs. D-33/34]), was a form of agency as a matter of law, citing *Greenough v. Willcox*, 238 Mich. 52 and other cases to this effect. The Appellate Division adopted this theory *in toto*, citing *Greenough's* case as the only authority in its opinion. The judgment for the Bank was affirmed (254 N. Y. App. Div. 128) by a divided court on this theory: that although agency had been established, there was no evidence of violation of agency; that the appellants having called Harriman as their own witness, they were concluded by his own statements to the effect that the sale to Cooley had been *bona fide*, etc., etc. etc.† This judgment of affirmance was in turn affirmed in 1939, but without opinion (279 N. Y. 781). Thus the New York courts held that the relation between Houde's stockholders and the Bank was one of principals and agent, and this upon a record devoid of the conclusive admissions found in the present record.

Petitioners' case, where not documentary, rests in principal part on admissions read from the respondents' testimony in the litigation above described and in the extensive depositions taken in the present suits.

The first of the suits disposed of by the judgment at bar was filed Sept. 14, 1938, on the equity side of the District Court (there designated Equity No. 2279); the complaint in the other suit (there designated Civil Action No. 182) was filed to reach additional parties on June 5, 1939. [I 2-3] Respondents Bank, Cantwell and Rea are parties to this

* An order sustaining a demurrer to the jurisdiction was affirmed at 254 N. Y. App. Div. 928.

† Needless to say, there was no evidence in that record of the existence of any such agreement as that evidenced by Ex. P-113 (see pp. 14-5, *supra*)—the very existence of which stood denied under oath as late as July of 1939 [II 1065-6].

second action† which was immediately consolidated with the former [I 174; 29 F. Supp. 37], the complaints being substantially identical in allegation and purpose (*i. e.*, to require an accounting of all profits and such damages in addition as might have been sustained by decedent's estate for which profits might not make decedent's estate whole).

THE OPINIONS BELOW.

The trial court filed an opinion [40 F. Supp. 675; I 177-202] and thereafter findings of fact. [I 202-45]

Circuit Judges Clark and Frank wrote in the Circuit Court of Appeals [III 2323; 128 F. (2d) 889]; their opinions are implicit with a common premise, *viz.*: federal courts of equity must apply the local law of limitations.

Judge Clark's opinion (which may or may not be a prevailing opinion) states the writer's readiness to accept the findings of the trial court as supported by evidence and the propriety of the legal conclusions based on those findings. But in this view Judge Clark was in the minority, for he notes that "the court as a whole" felt that the appeal should turn on the narrower issue of limitations. [III 2325; 128 F. (2d) 891]

Judge Clark held that any claim for relief at bar is governed by the New York statutes of limitation which constitute a complete defense. This conclusion rests on a construction of *Wechsler v. Bowman*, 285 N. Y. 284 (decided subsequent to the submission of the suits at bar), upon which both opinions below rely, and which is discussed in the accompanying brief. Petitioners submit that that case has been misconstrued, and that in any event the construction adopted has become untenable by reason of a later decision of the New York Court of Appeals.

Analysis of Judge Clark's opinion is difficult because it is impossible to state with certainty where Judge Clark's (presumably minority) views as to the merits end and where his views on the issue of limitations begin. Its salient points seem to be as follows:

† Rea was a non-resident of New York from 1931 until six weeks before he was served [II 1416-7; I 602], and thus without the protection of any statute of limitations (C. P. A. §19). *Banister v. Solomon*, 126 F. (2d) 740 (CCA 2).

1. The rule that Federal courts of equity will not follow state statutes of limitation where their application works inequity (*Kirby v. Lake Shore & M. S. Railroad*, 120 U. S. 130; *Russell v. Todd*, 309 U. S. 280 at 288) has no application because the suits at bar do not seek "purely equitable relief."

2. The ten-year statute of limitations governing New York suits in equity (C. P. A., §53) is inapplicable for the same reason.

3. The six-year statute of limitations of New York governing actions for fraud (C. P. A., §48 [5]) which postpones accrual of the cause of action until its discovery does not help petitioners. Two grounds are assigned for this holding: 1) the statute applies only where the fraud is accomplished through conspiracy—a proposition for which no New York case or statute law is cited or has been discovered; 2) decedent was on notice of the facts constituting the fraud upon him.

Judge Clark does not disapprove the trial court's 84th finding of fact to the effect that there is no evidence that decedent knew: a) of the arrangements between Cooley and the Bank and its officers preceding the dispatch to decedent of a notice to the effect that a binding sale of his stock had been effected, or that a document (Ex. P-112) was in existence evidencing those arrangements; or b) that prior to decedent's return from Europe Cooley had undertaken to kick-back 60% of the reserved one-quarter of the net profits of the syndicate theretofore arranged to the officers of the Bank, or that such undertaking was evidenced by a writing (Ex. P-113).

Since these facts were the very facts constituting the frauds complained of, Judge Clark apparently perceived the flaw in the conclusion that recovery was barred because decedent was on notice of the facts constituting the frauds, and so a new theory of limitations is interposed. Those facts of which decedent had no knowledge are treated separately; out of the total amount of damage, a moiety thereof is selected and specifically allocated to such facts of which decedent had no knowledge. And recovery of this specific

sum is denied on a separate ground, viz., that such fraction of the damage sustained might have been recovered in an action for money received, and therefore that the straight six-year limitation (C. P. A. §48[1]) should apply on the supposed authority of *Wechsler v. Bowman*, 285 N. Y. 284.

Judge Clark seeks to obviate the difficulties interposed by subdivision a of the 84th finding by assuming that since decedent knew of the Bank's participation* in a syndicate (which so far as decedent knew was not formed until weeks after a binding sale to Cooley had been effected, and the agency thereby terminated), it is of no moment whether this syndicate was part and parcel of the arrangements under which Cooley had actually made his "purchase," *during the life of the agency*. Subdivision b of the 84th finding is attempted to be disposed of by the proposition that since decedent knew that Cooley was to have 25% of the profits of a syndicate supposedly formed by Cooley long after he had been bound to a sale, decedent might not have cared that the Bank's officers had acquired interests in what was ostensibly Cooley's reserved profit as well as in the syndicate proper pursuant to arrangements made prior to decedent's return from Europe and not disclosed to him when he was seeking to avoid going through with the sale. It is submitted, with respectful deference, that fiduciary fraud can not be legalized by the possibility that the victimized *cestui* might not object.

4. The only other theories upon which petitioners could obtain relief were in actions *ex contractu* for money received or *ex delictu* for damages—governed respectively by the six-year statute prescribed by subdivisions 1 and 3 of C. P. A., §48. Judge Clark concludes that such is the essence of petitioners' claim, construing *Wechsler v. Bowman*, 285 N. Y. 284, to such effect.

Frank, C. J., filed an opinion for concurrence "but with the gravest doubts so far as the Bank and its principal officers are concerned." [2337; 128 F. (2d) 897] Character-

* Although decedent knew that the Bank's officers and directors participated in the syndicate, there is no evidence that decedent knew of the Bank's participation therein.

izing the testimony of the Bank's officers in these suits as "not worthy of belief" [III 2344; 128 F. (2d) 900] Judge Frank severely criticises their conduct in the transactions at bar as well as their testimony—noting that decedent's participation in the syndicate was under the impression, sedulously cultivated and maintained by the Bank, that a *bona fide* sale had been effected to Cooley long before there was any talk of syndicating his purchase. [III 2340-2; 128 F. (2d) 898-9]

But Judge Frank, "although puzzled," agreed that *Wechsler v. Bowman*, *supra*, appeared to bar any claim for relief. His opinion concludes

"Yet I should not be surprised if the New York courts, in some later case, should hold that this conclusion is wrong with respect to commissions paid by the principal in such circumstances as are found here, or if the United States Supreme Court, should it review our decision, were to hold that we had misunderstood the Wechsler case." [128 F. (2d) 889 at 902; III 2347] Swan, C. J., filed no opinion.

REASONS FOR ALLOWANCE OF WRIT.

I. The Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this court. (Argued in supporting brief, p. 36 *infra*.)

II. In any event, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should now be settled by this court. (Argued in supporting brief, p. 38, *infra*.)

III. The Circuit Court of Appeals has decided an important question of federal law in conflict with the decisions of other Circuit Courts of Appeal. (Argued in supporting brief, p. 38, *infra*.)

IV. Assuming the applicability of local law, the Circuit Court of Appeals has decided important questions of New York law in conflict with applicable New York case and statute law, in this, to wit: a) by holding that no claim for

relief herein is governed by the ten-year period of limitations prescribed by C. P. A. §53, and that any claim for relief herein is barred by C. P. A. §§48 (1) or 48 (3); b) in its erroneous application of C. P. A. §48 (5), prescribing a six-year period of limitations for actions for fraud, but postponing accrual of such causes of action to discovery of the facts constituting the fraud; c) in its misconstruction of *Wechsler v. Bowman*, 285 N. Y. 284, and its erroneous application of that case as misconstrued to petitioners' claims—assuming that *Wechsler's* case retains authority in the light of a subsequent decision of the New York Court of Appeals. (Argued in supporting brief, p. 40, *infra*.)

CONCLUSION.

Wherefore, petitioners respectfully pray that this petition for a writ of certiorari be granted.

ELLSWORTH C. ALVORD,
JULES C. RANDAL,
Petitioners' Counsel.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

This petition invokes the jurisdiction of this court under Judicial Code, §240 (a), as amended by the act of Feb. 13, 1925 (43 Stat. 938). The judgment sought to be reviewed was filed July 6, 1942. [III 2348]

The District Court's opinion [I 177-201] is reported at 40 F. Supp. 675; it is briefly described at p. 5, *supra*, of the petition. The opinions in the Circuit Court of Appeals [III 2334-2337] are reported at 128 F. (2d) 889, 897; a description of these opinions appears at pp. 29-32, *supra*, of the petition.

The facts demonstrating the existence of the questions involved are set forth under the caption "Summary Statement of the Case", at pp. 4-29, *supra*, of the petition. We emphasize as all-important the trial court's 84th finding of fact—undisturbed by the Circuit Court of Appeals—that there was no evidence that decedent knew the facts making fraudulent the transactions of which petitioners complain.

This brief's function is to outline the argument in support of the reasons assigned for the allowance of the writ of certiorari. Because the decision of the Circuit Court of Appeals centers around its construction of *Wechsler v. Bowman*, 285 N. Y. 284, argument will be expedited by initially stating the principles upon which that case rests and a resume of its holding.

For fifty years prior to 1941 recurring New York authorities respecting the application of statutes of limitations have held that allegation and proof of actual fraud will be disregarded if the plaintiff could obtain *complete* relief without proof of fraud, and that statute of limitations will be applied which would bar the remedy had no fraud been alleged or proved. Such "doctrine" (honored as often in the breach as in the observance) makes immaterial, so far as limitations are concerned, the plaintiff's discovery of the fact that he had been defrauded, or his ignorance of his rights.

The leading case on this subject is *Carr v. Thompson*, 87 N. Y. 160 (1881), where an agent had succeeded in settling

fictitious accounts with his principal who did not discover the accounts' falsity until more than six years had elapsed. The principal then sued to have the accounts set aside and to recover the money of which he had been cheated. The New York Court of Appeals rejected the principal's claim that because the complaint sounded in fraud, the cause of action did not accrue until the fraud's discovery (under the statutory predecessor of C. P. A. § 48 [5]); it held that since the principal could have had a complete recovery in an action for money received without proving fraud at all, the six-year statute (now known as C. P. A. §48 [1]) applicable to actions for money received governed and barred the remedy despite the principal's ignorance of the fact that he had a cause of action until more than six years after the commission of the wrong.

Subsequent New York decisions extended this "adequacy of remedy" doctrine to a wide variety of actions; to actions to set aside fraudulent conveyances (*Hearn Corp. v. Juno*, 283 N. Y. 139, where allegations of actual fraud were disregarded); to actions to recover damages for negligent acquiescence in a breach of fiduciary duty (*Potter v. Walker*, 276 *id.* 15); to various types of action *ex contractu* (e. g., *Brick v. Cohn-Hall-Marx Co.*, *id.* 259).

Wechsler v. Bowman, 285 N. Y. 284 (1941) appears as a significant deviation from this doctrine (v., further discussion at p. 53, *infra*). In that case, a sales agent for an estate had at the instigation of its dishonest executor turned over his commission from the estate to that executor and collected another commission in equal amount from the purchaser of the estate's property. The facts remained secret for more than six years. No actual fraud was alleged in connection with the collection of the second commission from the purchaser and the only fraud alleged at all consisted of the agent's billing the estate for a sales commission and signing a receipt for that commission without disclosing his agreement with the executor and his intention to collect another commission from the purchaser. It was held that recovery of the commission collected from the purchaser was barred by the six-year statute of limitations

applicable to actions for money received (C. P. A. §48 [1]). Recovery of the commission collected from the estate was allowed on a theory of actual fraud, because the agent had later turned over that commission to the dishonest executor and an action for money received would not have constituted an adequate remedy since that commission had not been retained and the agent's estate had not thereby been enriched (285 N. Y. 284 at 294).

REASON I.

Federal question decided in conflict with applicable decisions of this court.

1. *Decisions of this court.* The equity jurisdiction of the federal courts is derived from the constitution and the laws of the United States. The principles of equity jurisprudence and the remedial processes of equity administered in the federal courts are uniform for all the states, and are subject neither to the limitation nor the restraint of state law. So far as the powers and jurisdiction of the federal courts of equity are concerned, it is alike immaterial whether the state in which such federal courts of equity sit may choose to nullify one or more equitable principles or to dispense with equity altogether. It is the duty of the inferior federal courts sitting in equity to enforce equity and good conscience in accordance with the views of this court, and to do so without regard to the views entertained by the courts of the state in which they may happen to sit. *Payne v. Hook*, 7 Wall. 421 at 430; *Noonan v. Lee*, 2 Black 509; *U. S. v. Howland*, 4 Wheat. 115; *Neves v. Scott*, 13 How. 287 at 272.

The federal courts sitting in equity will generally apply local statutes of limitation by analogy in determining the period of laches, particularly in cases where there is a concurrent remedy at law. But fraud creates an exception to this rule. *Russell v. Todd*, 309 U. S. 280 at 288, n. 1, and cases there cited; *Kelly v. Boettcher*, 85 F. 52; *Chiswell v. Johnston*, 289 F. 681; *Carr v. Hilton*, 1 Curtis 230, 238.

The rationale of this exception was stated by Miller, J., in *Bailey v. Glover*, 21 Wall. 342, 349:

“To hold that by concealing a fraud or by committing a fraud in such a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law, which was designed to prevent fraud, the means by which it is made successful and secure.”

Kirby v. Lake Shore & M. S. Railroad, 120 U. S. 130 (1887) is the leading case and rules the decision at bar. There plaintiff sued in a federal court sitting in New York to set aside as fraudulent accounts settled by his testator with defendants, and for a money decree on the accounts as recast. The trial court had sustained a demurrer based on the statutory predecessors of C. P. A., §§48 (1) and 48 (5), as construed in *Carr v. Thompson*, *supra*.

Upon appeal to this court it was held that the *Carr v. Thompson* doctrine was repugnant to the principles of equity as administered in the federal courts and not binding upon them because inconsonant with equity, Harlan, J., writing that:

“* * * it is an established rule in equity, as administered in the courts of the United States, that, where relief is asked on the grounds of actual fraud, especially if such fraud has been concealed, time will not run in favor of the defendant until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered.” (120 U. S. 130 at 136.)

2. *The decision of the Circuit Court of Appeals.* The opinions at bar refer to and rely upon the decision of the New York Court of Appeals in *Wechsler v. Bowman*, *supra*.

It now suffices to point out that, assuming the *Wechsler* case has any application to the facts at bar, so much of it as would tend to bring the bar of the six-year statute of limitations (C. P. A., §§ 48 [1] or 48 [3]) into operation rests solely upon the *Carr v. Thompson* doctrine.

Since *Carr v. Thompson*, *supra*, has been explicitly rejected by this court as not binding on federal courts of equity, it is submitted that the conflict in decision is patent.

REASON II.

In any event, an important federal question has been decided by the Circuit Court of Appeals which has not been, but ought to be decided by this court.

The Circuit Court of Appeals' disregard of the rule in *Kirby's case*, *supra*, with its specific condemnation of the *Carr v. Thompson* doctrine is undoubtedly due to doubts occasioned as to the continued vitality of *Kirby's case* after this court's decisions in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 and *Ruhlin v. N. Y. Life Ins. Co.*, *id.*, 202. Our argument here assumes that these doubts are well founded.

It is our submission that the question of whether federal or local law is applicable always presents a federal question of importance.

If federal courts of equity are now required in cases where their jurisdiction depends on diversity of citizenship to apply local case and statute law respecting limitations without regard to the inequity of the result, the bench and bar should be promptly so informed.*

This very question was mooted in *Russell v. Todd*, 309 U. S. 280 (where there was an independent ground of federal jurisdiction) but was left unanswered until occasion might require its decision. (309 U. S. 280 at 294.) This petition squarely presents the question, and the occasion for its decision is now here.

REASON III.

Conflict of decision in the Circuit Courts of Appeal on an important federal question.

The opinions in the courts below are implicit with the assumption that federal courts of equity must apply the law of limitations local to the state in which the federal court sits.

In cases decided subsequent to this court's decisions in the *Erie Railroad* and *Ruhlin* cases, *supra*, the Circuit

* Cf., Mr. Justice Jackson in *D'Oench Duhme & Co. v. Federal D. I. Corp.*, 315 U. S. 447, 467, n. 3, and text thereto.

Courts of Appeal for the Fourth, Fifth and Eighth Circuits have ruled that federal courts of equity generally follow local law pertaining to limitations, but are not obliged to do so where application of the local law of limitations would be inconsonant with equity.

Fretwell v. Gillette Co., 106 F. (2d) 728 (C. C. A. 4); cert. den. 310 U. S. 627, reh. den. 311 U. S. 734, 313 U. S. 600;

Holliday v. Wade, 117 F. (2d) 154 (C. C. A. 5);

Borserine v. Maryland Casualty Co., 112 F. (2d) 409, at 416 (C. C. A. 8).

In *Fretwell's* case, *supra*, Parker, C. J., said:

"The rule is well stated by the late Judge Walter H. Sanborn in (*Kelley v. Boettcher*, 85 F. 55, 62) as follows: 'In the application of the doctrine of laches, the settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character, * * * The meaning of this rule is that under ordinary circumstances, a suit in equity will not be stayed after the time fixed by the analogous statute of limitations at law; but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it.' "

In *Borserine's* case, *supra*, *Kelley v. Boettcher* and numerous other authorities are cited in support of the same doctrine.

It is true that in none of the decisions of the Circuit Courts of Appeals just cited were circumstances discovered which made the application of the local law of limitations inconsonant with equity. But all of them recognize the right and duty of federal courts of equity to disregard the local law of limitations where its application would work inequity.

The District Courts for Idaho and Eastern Pennsylvania have recently been presented with situations where appli-

cation of the local law of limitations would have worked inequity and have unhesitatingly rejected that local law which would have otherwise barred relief because the circumstances rendered such course necessary in the interests of equity and good conscience. (*Cummings v. Langroise*, 36 F. Supp. 174 at 179, (Idaho, 1940); *Overfield v. Pennroad Corp.*, 39 F. Supp. 482 at 486, 42 F. 586 at 611-2 (E. D. Pa. 1941).

REASON IV.

Decision as to important questions of New York law in conflict with New York case and statute law.

The foregoing argument has proceeded on the assumption that this petition presents federal questions. The argument which follows proceeds on the assumption of the Circuit Court of Appeals, that the New York law of limitations must be applied. Upon that assumption it is our argument: A) that every claim for relief herein is governed by the ten-year statute of limitations prescribed by C. P. A., §53, and that actions *ex contractu* or *ex delictu* governed by C. P. A., §§48 (1) and 48 (3), would not have afforded a certain, complete and adequate remedy to decedent or petitioners; B) that the decisions of the New York courts show that the Circuit Court of Appeals has erroneously applied C. P. A. §48 (5), assuming it to be applicable; C) that *Wechsler v. Bowman*, 285 N. Y. 284, has been misunderstood by the Circuit Court of Appeals, misapplied as so misconstrued, and in any event, that its authority in a situation such as is presented at bar has been destroyed by a subsequent decision, *Nasaba Corp. v. Harfred Corp.*, 287 N. Y. 290.

A.

Assuming, *arguendo*, defendants' claim that this court is bound by the statutes of limitation of New York as construed by its courts, we say that every claim for relief at bar is governed by C. P. A., §53 prescribing a ten-year period of limitations for suits in equity. (*Gilmore v. Ham*, 142 N. Y. 1, *Matter of Rogers*, 153 *id.*, 316; *Treadwell v. Ciark*, 190 *id.* 51; *Ford v. Clendenin*, 215 *id.* 10) The cited

section applies herein for two reasons; these suits are cognizable only in equity, and no action at law lies at all; and more importantly, complete, certain and adequate relief is obtainable only in equity.

The first of these propositions is settled law: one executor may not collect a claim due his decedent's estate from a co-executor in an action at law, and in such case equity has exclusive jurisdiction. *Rundle v. Allison*, 34 N. Y. 180, not only so holds,* but explicitly rules that such reason alone requires the application of the ten-year period of limitations. That case did not present the more compelling reason for the application of the ten-year statute present at bar—the lack of a certain and adequate remedy at law; to the contrary, it there appeared that but for the inability to sue at law, the plaintiff's claim would have been barred by a six-year statute applicable to actions sounding in debt.

The second and more important of these propositions is established by the leading modern authority on the application of the equity statute of limitations in New York. In that case, *Hanover v. Morse*, 270 N. Y. 86, plaintiff insurer sued to reform an insurance policy procured by it from defendant by a fraudulent concealment. The sole issue was whether the six or ten-year statute of limitations applied. It was held that in equitable actions based upon active fraud the statute of limitations did not begin to run until ten years after the fraud's discovery (270 N. Y. 86 at 91). The court enunciated the following rule as to the application of the ten-year statute:

“In an action in equity the ten-year limitation prescribed by section 53 of the Civil Practice Act is applicable unless, in a particular action, a party has a choice of two remedies, one at law, the other in equity, both complete and adequate, and he selects the action in equity. In that event the party whose cause of action would be barred under the six-year statute, if he should elect to proceed at law, may not enlarge this time by

* Accord: *MacGregor v. MacGregor*, 35 N. Y. 218; *Wallach v. Dryfoos*, 140 N. Y. App. Div. 438; and see also cases collected at 63 A. L. R. 439.

electing to proceed in equity. Such is the rule where the remedies are concurrent." (Citing cases.)

"The exception is not applicable in cases of concurrent jurisdiction, however, if a party's remedy at law is inadequate and imperfect and he is required to go into equity to procure complete and adequate relief." (Citing *Rundle's case*, *supra*) (270 N. Y. 86, 89).

In *Hearn Corp. v. Jano*, 283 N. Y. 139, plaintiff waited six years after learning of conveyances in fraud of its judgment claim before seeking relief in equity. Although plaintiff had a complete remedy at law for the collection of its judgment,* and had pleaded actual fraudulent intent, the judgments of the courts below dismissing the complaint as barred by C. P. A., §48 (5) were reversed on the strength of the *Hanover* case, *supra*, because the remedy at law, while complete, was not as certain as that afforded in equity, where a ten-year period of limitations (C. P. A., §53) governed.

In *Potter v. Walker*, 252 N. Y. App. Div. 244, 276 N. Y. 15, the complaint in a stockholders' suit stated a number of causes of action against numerous corporate directors, some of whom had profited and others of whom had not benefited from the transactions in question. The first cause of action alleged that certain director defendants had profited to the extent of \$2,505,000 from wrongful dealing in the corporation's property, resulting in a loss to the corporation of \$7,802,743. (276 N. Y. at p. 24.) An accounting for these profits and damages was sought. Citing *Hanover v. Morse*, *supra*, and *Falk v. Hoffman*, 233 N. Y. 199,† the Appellate Division held (252 N. Y. App. Div. 244)

* Under the Uniform Fraudulent Conveyance Act, New York Debtor and Creditor law, §278-b.

† The significance of the citation of this case, a suit in equity to rescind, to the facts in *Potter's case* where recovery of money only was sought should be noted. In *Falk's case* Judge Cardozo held that the purpose of the action was to impress a trust upon property obtained from plaintiff by a fraud similar to that pleaded and proved at bar. Judge Cardozo adopted the view of Smith, J., dissenting in the court below (189 N. Y. App. Div. 832, 843), that it was not necessary for the complaint to demand that a trust be impressed on the monies because such was the whole purpose of the action. Petitioners submit that all property and money gained by respondents as profits from the transactions at bar are held on a constructive trust for petitioners' estate.

that no remedy at law could be as complete or effective as the remedy in equity; accordingly that so far as those directors who had profited from the transaction were concerned, the ten-year period of limitations prescribed by C. P. A., §53 governed rather than the six-year period prescribed by §48. This judgment was critically examined in the New York Court of Appeals and affirmed as to reasoning and result (276 N. Y. 15).

Potter v. Walker plainly holds that a ten-year statute of limitations is to be applied to any suit for an accounting from a fiduciary who has gained profit from dealing in his fiduciary relation and caused loss to the estate represented by him. Construing that case in *Mencher v. Richards*, 283 N. Y. 176, Sears, J., said:

“* * * we there (*i. e.*, in *Potter v. Walker*) held in applying the Statute of Limitations that the action was to be treated in the same way as though the corporation were the plaintiff, and, that if the action was to recover profits which the director had wrongfully received and for which he would be liable to account, it was equitable in nature and subject to the ten-year statute * * *.” (283 N. Y. 176 at 182.)

In *Dunlop v. Dunlop*, 259 N. Y. App. Div. 233, two officers of a small family corporation had sold property to it at an advance of \$15,500. The corporation's auditors insisted that this profit be shown on its books as a charge against the officers, and appropriate journal and ledger entries disclosing the detail of the transaction were then made on the corporate books. More than six years thereafter the corporation brought suit for the profit. The Appellate Division held that no accounting was necessary, that in effect only the corporate loss (necessarily co-extensive with the profit) was being sought, that *Potter v. Walker* had no application, and accordingly that the action was barred by the six-year statute (C. P. A. 48 [1]) applicable to actions for money received. This judgment, readily intelligible in the light of the facts, was affirmed at 285 N. Y. 333. The language of the brief *per curiam* affirmance occasioned some confusion since it appeared to say that *Potter*

v. Walker applied only in those cases where profits exceeded losses—i. e. were not co-extensive therewith. (As noted at p. 42, *supra*, the situation in *Potter v. Walker* was exactly the reverse—losses were more than three times as large as profits.) Opportunity for further confusion has now been obviated by legislation adopting a straight six-year period of limitations for all stockholders' actions (N. Y. Laws of 1942, Chap. 851).

The other cases decided subsequent to *Potter v. Walker* cited by Judge Clark as foreclosing a recovery at bar are *Frank v. Carlisle*, 286 N. Y. 586, and *Cwerdinski v. Bent*, 256 N. Y. App. Div. 612. *Frank v. Carlisle* is a *per curiam* affirmance on the authority of *Dunlop v. Dunlop*, *supra*, and reference to the opinion below (261 N. Y. App. Div. 13) discloses that the situation there presented was essentially the same as that in *Dunlop's case*, viz.: the purchase of property by corporate directors at one price and its resale to their corporation at a higher price—a situation involving a “sum of money which can be computed readily” and manifestly requiring no accounting. Accordingly the six-year statute of limitations barring actions for money received was held applicable. *Cwerdinski v. Bent*, *supra*, a stockholders action for waste, did not present a situation where profits were gained from dealing in the corporation's property and there was no occasion at all for an accounting.

Respondents urged below and the Circuit Court of Appeals appears to have held that actions *ex contractu* for money received or in tort for damages (governed respectively by subdivisions 1 and 3 of the six-year statute, C.P.A. §48) constituted concurrent remedies at law as certain, complete and adequate as were available in an equitable suit for an accounting.*

Petitioners submit that this is manifestly erroneous. In equity an accounting can be had from those respondents

* Clark, C. J., even asserts [III 2337; 128 F. (2d) 889 at 896] that “New York law has always been quite definite that an equitable remedy is not to be had on a claim such as this against agents, even if an accounting is asked for.” This statement is not supported by the cases cited therefor; the leading case, *Marvin v. Brooks*, 94 N. Y. 71, holds that an agent to deal in property can always be required to account in equity.

guilty of fraud or conscious participation in a breach of trust. On such accounting such respondents will be jointly and severally liable as constructive trustees *ex maleficio*, and this without regard to whether the profits have been retained by them, or diverted to others by prior assignments, syndicate arrangements or devices of any other nature whatsoever. Profits can be followed in cash or property until the equity of a *bona fide* purchaser for value intervenes. If the balance on such accounting equals or exceeds the decedent's loss, then this is the measure of recovery—for equity will not permit a fiduciary to profit from abusing his trust, and this quite independently of theories of rescission or affirmance. If the balance on such accounting is less than the decedent's loss, then equity will ascertain the difference and charge the difference against the wrongdoing defendants so that decedent's estate may be made whole. (*Frier v. J. W. Sales Corp.*, 261 N. Y. App. Div. 388; *Falk v. Hoffman*, 233 N. Y. 199; *Buffum v. Barceloux*, 289 U. S. 227.)

In contrast, the relief obtainable by an action *ex delictu* for damages is demonstrably uncertain. Were the value of Houde's stock found to be less than the price at which a sale had supposedly been effected on Oct. 11, no damages could be recovered. Similarly, were the value of Houde's stock found to have been less than \$6,000,000, the price at which it was resold in November, the recovery would necessarily be less than that obtainable in equity on an accounting for unlawful profits. (*Rothschild v. Mack*, 115 N. Y. 1, 8; *Reno v. Bull*, 226 *id.* 546; *Falk v. Hoffman*, *supra*.)

On the other hand, the remedy at law for money had and received is not merely uncertain, but plainly inadequate. The liability in an action for money received is several and not joint. But in equity the liability would be joint and several. The distinction has obvious importance in the suits at bar. Sued in equity, Cooley, the Bank and its officers, at the least, would be jointly and severally liable for the entire profit* realized upon the resale in Novem-

* *I. e.*, 100% of the profit on the resale after being increased by the elimination of items of expense improper because incurred in the course of perpetrating a fraud. Such items are substantial [Ex. P-192].

ber, less only such sums as must be restored by decedent by reason of his participation in the syndicate which he supposed was formed by Cooley. But in an action at law, these respondents would only be liable for the profits which they obtained and retained. (*Wechsler v. Bowman*, 285 N. Y. 284 at 294. When it is remembered (petition, pp. 21-2, *supra*) that profits in huge amounts were realized from these transactions which never reached the hands of the respondents at all (by reason of income-tax avoidance arrangements), and when it is seen that upwards of forty persons (counting partnerships as single entities) received profits derived from the Bank's transactions in Houde's stock prior to Dec. 6, 1928, the inadequacy of an action for money received becomes clear. Less than 20% of the profits realized before Dec. 6 were retained by the Bank; and a part of those profits was in turn transmitted to Central and Eastman-Dillon. More than 80% of the profits realized prior to Dec. 6, 1928, never came into the Bank's hands at all, but were distributed by it and its officers pursuant to the terms of a syndicate agreement which provided that the liability of the subscribers should be several and not joint. About 95% of that profit was realized under the terms of agreements made between the Bank, its officers and Cooley prior to decedent's return from Europe,—i. e., through the syndicate provided for by Exs. P-112/113. But not all of the recipients of such profits were syndicate subscribers. Some of the allottees of participations in the syndicate (including Cooley, Wurst, Rea and Sawyer) so arranged matters that all or part of their syndicate profits should be held for the benefit of or paid directly to others.

Can it be seriously argued that forty or more actions for money received offer as complete and adequate a remedy as a single suit for an accounting in which joint and several liability would be imposed and profits in *property* and money traced? Is not the situation at bar one which presents "entanglements that (call) for discovery and accounting?" (Cardozo, J., in *Buffum v. Barceloux*, 289 U. S. 227 at 235; and see *Falk v. Hoffman*, 233 N. Y. 199).

No New York case can be found which holds under circumstances such as these that an action for money received

would constitute as complete and adequate a remedy as that afforded in an equitable suit for an accounting. The cases cited to the contrary by Clark, C. J., [III 2337; 128 F. (2d) 889 at 897] involved relatively simple situations devoid of the slightest complexity.* Not one of these authorities involved a situation remotely comparable to that at bar where large portions of the profits were neither obtained or retained by those guilty of fraudulent breach of trust.

Finally it is to be remembered that an action *ex contractu* for money received constitutes a waiver of any claim in tort for damages, a matter of great importance at bar where there is substantial evidence that the value of Houde's stock greatly exceeded the profits derived therefrom by the respondents. In equity damages would be assessed to the extent that restitution of profits failed to make decedent's estate whole. In an action for money received, the victim of the fraud would be required to sacrifice the additional damages he sustained in order to obtain restitution of profits which a fraud feisor can not be entitled to retain under any circumstances.

Furthermore, an action for money received would not have furnished complete relief even with respect to the profits realized from the syndicate allotments to the Bank's officers or the kick-back payments made to them by Cooley. Cooley and the Bank's officers had diverted the bulk of these profits to others (v., petition, pp. 21-2 *supra*) and no action for money received lay against them for their recovery. (*Wechsler v. Bowman*, 285 N. Y. 284 at 294.) The Bank shared its commission with Central and Eastman-Dillon (v., petition, p. 22 *supra*), and accordingly an action for money received would have only permitted recovery of that portion of the commission which it retained.

**Carr v. Thompson*, 87 N. Y. 160, and *Mills v. Mills*, 115 *id.* 80, involved the liability to account of a single defendant, *Keys v. Leopold*, 241 *id.* 189, that of one firm of brokers, *Roberts v. Ely*, 113 *id.* 128, that of the executors of one wrongdoer. *Frank v. Carlisle*, 261 N. Y. App. Div. 13 (aff'd. 286 N. Y. 586, on the authority of *Dunlop v. Dunlop*, *supra*) involved more than one defendant, but is not at all in point, for there, as in *Dunlop's* case, *supra*, the plaintiff was seeking to recover losses under the guise of profits—the two being necessarily co-extensive (cf., 259 N. Y. App. Div. 233, 235). The same situation was presented in *Cwerdinski v. Bent*, 256 N. Y. App. Div. 612, an action for waste.

B.

Petitioners submit that the decision of the Circuit Court of Appeals to the effect that the respondents' liability for fraud is barred by C.P.A., § 48 (5) is contrary to applicable New York case and statute law.

One who obtains fiduciary employment without disclosing his intention to deal in the subject matter of that employment, and every fact and circumstance touching his fitness to enter into that employment is guilty of active fraud as a matter of law. (*Heckscher v. Edenborn*, 203 N. Y. 210; cf., *Edenborn v. Sim*, 242 U. S. 131.) In the present suits it is indubitable that at the time the Bank acquired its agency from decedent, it intended to deal in the subject matter thereof for its own profit and for the joint profit of Central and Eastman-Dillon. There is no suggestion that it disclosed that intention to decedent; to the contrary, it appears that such intention was deliberately concealed from decedent. (See, petition, pp. 7-10, *supra*). There is neither evidence nor finding which could support any inference, however remote, that decedent was ever on notice of the facts constituting this fraud.

In *Michoud v. Girod*, 4 How. 503, this court, reviewing the pertinent authorities in New York and England, said:

"The rule of equity is, in every code of jurisprudence with which we are acquainted, that a purchase by a trustee or agent of the particular property of which he has the sale, whether he has an interest in it or not * * * carries fraud on the face of it." (4 How. 503 at 553).

The evidence in the present suits reviewed at pp. 10-17, *supra*, establishes that here the frauds in the execution of the agency were deliberate and not merely constructive, being accompanied and consummated by deceitful representations and concealments.

We review under numbered subdivisions the arguments urged by respondents below, and apparently adopted by Clark, C. J., for the proposition that respondents' liability

for active fraud in this connection was barred by C.P.A., §48 (5).

1. Respondents urged below and Clark, C. J., appears to have agreed that the fraud perpetrated on decedent could have been completely redressed by an action for money received, citing *Wechsler v. Bowman*, *supra*, for such proposition.

This is manifestly unsound. Assuming (but not conceding) that actions for money received would permit recovery of the brokerage commission collected by the Bank from decedent and a portion of the profits realized by the Bank's officers, such recovery constitutes but a minor fraction of the profits realized from the fraudulent transactions and an insignificant fraction of the damages sustained as a result thereof. In essence, petitioners' remedy (sought promptly after they gained knowledge of their rights) is being barred because their testator had another cause of action through which, had it not been concealed from him, some moiety of the actual damage sustained might have been recovered. Neither *Wechsler's case* nor any other New York authority supports such an argument which does plain violence to the language of C. P. A. §48 (5) postponing accrual of causes of action for fraud until such time as the facts constituting such fraud are discovered.

2. Respondents argued below, and Clark, C. J., appears to have agreed that the arrangements made between the Bank, its officers and Cooley prior to the decedent's return from Europe were mere minor "details", the knowledge of which was immaterial in view of decedent's participation in the syndicate formed long after a supposedly *bona fide* sale to Cooley had been effected, after decedent had been assured by Wurst that Cooley was the actual purchaser of Houde's stock and not a nominee, and after the sale had been completely consummated.

With respectful deference for Judge Clark's views, it must still be said that this is a most breath-taking proposition. It might as well be argued that it is a mere detail that the samples upon which a man buys a mine turn out to have been salted. (*Cf., Mudsill Mining Co. v. Watrous*, 61 F. 163).

It is petitioners' submission that the very core of their lawsuits is that during decedent's absence abroad and while the Bank was acting as his fiduciary, the Bank and its officers arranged to and did acquire substantial interests and complete control of the stock for which the Bank was an agent to sell, and thereafter and by fraudulent misrepresentations induced decedent reluctantly to consummate a sale to which he was not bound. Respondents did not plead and never have claimed that decedent knew of the arrangements made during his absence in Europe, and the trial court specifically found that there was no evidence that he had such knowledge. Under these circumstances to assert that the decedent "had actual knowledge of the basic and material facts with respect to the Houde transactions"* is equivalent to an assertion that the victim of a fraud has full knowledge of the facts without knowing those facts which make the transaction fraudulent. This is a solecism as fantastic as a Hamlet without the Prince of Denmark. Its fallacy is sufficiently indicated by Judge Frank [III 2340-2; 128 F. (2d) 889 at 898-9].

3. Respondents argued below, and Judge Clark appears to have agreed that the fact that decedent participated in the syndicate and knew that the Bank had loaned money to Cooley was enough to make it immaterial that he was not apprised that this syndicate and loan had been arranged for long before decedent received a notice that a sale had been effected to Cooley. *Buffum v. Barceloux Co.*, 289 U. S. 227, furnishes a complete answer to this claim. In that case a trustee in bankruptcy sued to recover the value of property fraudulently conveyed by the bankrupt and acquired by the defendant. The conveyance was by way of pledge to defendant which it had then foreclosed under the form of a public sale.

Judge Cardozo, speaking for this court, said:

"The unconscionable sale is not to be viewed in isolation, as something disconnected from the pledge, an accident or afterthought. It was the fruit for which

* Trial court's fifth conclusion of law (1 245) approved by Clark, C. J. [128 F. (2d) 889 at 896; III 2335]

the seed was planted, or so the trier of the facts might look at it." (289 U. S. 227 at 233).

In the suits at bar, the trier of the facts had no option as to whether or not the syndicate and the loan were accidents or afterthoughts. Respondents' own testimony (see petition, pp. 11-14, *supra*) and Exs. P-112 and P-113 left no choice of inferences to the trier of the facts and compel the holding as a matter of law that the syndicate loan and the kick-back payments by Cooley to the Bank's officers were the fruits for which the seed had been planted long before decedent was informed that his stock had been sold to Cooley.

4. Judge Clark's holding (III 2335; 128 F. (2d) 889 at 896) that petitioners could not recover without proving a conspiracy to defraud is supported by no citation of New York authority. New York and other authorities establishing that the tort and not the conspiracy is the gravamen of the action are reviewed in the cases cited in the note hereto.*

Assuming (but not conceding) that proof of conspiracy to defraud decedent "in or about the month of July, 1928" (Complaint, Par. III [I 14]) rested on "highly involved" inferences [Clark, C. J.: III, 2336; 128 F. (2d) 889 at 896] the arrangements made between the Bank, its officers and Cooley prior to decedent's return from Europe were conspiratorial and fraudulent as a matter of law; indeed, the testimony of these respondents, the documents they then created and the avowals of their own counsel foreclose controversy on this issue. (See petition, pp. 11-14, *supra*.)

It is our submission that suitors in equity have a right to such relief consistent with their pleadings as may be required by their proofs in the light of equity and good conscience. Assuming, but not conceding, that there was no conspiracy formed "in or about the month of July, 1928," petitioners pleaded and conclusively proved that conspiratorial frauds were being carried into execution during the early part of October. (See, petition, pp. 10-14, *supra*.) They

* *Brackett v. Griswold*, 112 N. Y. 454 at 466; *Howland v. Corn*, 232 F. 35 at 40 (C.C.A. 2); *Lewis Co. v. Columbia Corp.*, 80 F. (2d) 862 at 864; *Barry v. Legler*, 39 *id.* 297 at 303.

were accordingly entitled to relief.

5. We submit that the opinion of Judge Clark contains palpable errors in reasoning on the subject of notice, and that the applicable New York authorities are in conflict with his holding.

The principles governing the subject of notice as starting the running of the statute of limitations are well settled. Where a person has knowledge of facts of a character which would reasonably put him on inquiry, and such inquiry, if pursued, would have led to a discovery of the fraud, he will be charged with having discovered it if he had pursued with reasonable diligence the inquiry when he should have done so. The facts must be such as to create a duty to inquire and there must be avenues of inquiry which, if pursued, would disclose the truth and expose the fraud.*

Were any facts known to decedent which created a duty of inquiry? Before such a duty could arise, the decedent must have had reason to believe that the Bank never had intended to act as his agent and that it and its officers had acquired interests in his stock while purporting to be acting as his agent. The trial court's 84th finding of fact is tantamount to a finding that the decedent never knew of these facts. Judge Frank points out that they were "elaborately concealed."

There is the further question: Were there avenues of inquiry open to decedent which, if pursued, would have exposed the fraud and disclosed the truth? Respondents' testimony establishes that no avenues for such inquiry existed: Exs. P-112/3 were kept in the private files of the parties and the arrangements reflected therein were not disclosed to the Bank's own directors, much less to decedent.†

Finally, any duty of inquiry which could conceivably have been imposed upon decedent (and we deny that the facts known by decedent were such as to put him on inquiry) was completely discharged on Oct. 18 when he demanded, received and acted on Wurst's assurances that Cooley was a

* The text is paraphrased from the opinion in *Bancroft v. Woodward*, 183 Cal. 99, and embodies the principles applied in the New York and Federal courts (*Higgins v. Crouse*, 147 N. Y. 411; *Williamson v. Brown*, 15 N. Y. 354; *Fleischacker v. Blum*, 109 F. (2d) 453).

† I 507, 781-3; II 994, 1048-51, 1053-5; III 2271-2.

bona fide purchaser and not a nominee. The pertinent principle is clearly stated (citing New York and other authorities) under the title Notice, §31, 46 C. J. 546:

“Consequently, when one has sought the best authority to ascertain the truth of rumors or statements which have put him on inquiry, and has then been misled, the person misleading him cannot be allowed to support rights by insisting that the party shall still be chargeable with notice of statements which he has endeavored in vain to verify. * * * After inquiry has been made and proved futile, further information of a vague and definite character is insufficient to put the party upon inquiry.”

C.

We stated at the beginning of this brief (p. 35, *supra*) and now show that *Wechsler v. Bowman*, 285 N. Y. 284, represents a significant deviation if not departure from the rule in *Carr v. Thompson*. It will be recalled that in *Wechsler's* case the sales agent was held liable on a theory of fraud for a commission collected by him from an estate which he had later turned over to its dishonest executor, in the meantime having at that executor's instance arranged to collect a further commission from the purchaser of the estate's property.

A principal, whose agent has violated his duties, has among other remedies against the agent an action in contract, in tort and in *quasi* contract (2 Restatement of Agency, §399, pp. 903-4). Under the *Carr v. Thompson* doctrine any one of these remedies (each governed by C. P. A., §48 [1]) lay against the agent in *Wechsler's* case for both commissions collected by him, *i. e.*, the commission collected from the estate and that collected from the purchaser.

In *Wechsler's* case, the facts having remained secret for more than six years, the principal's action thereafter brought to recover the commission collected from the purchaser was held barred by the six-year statute of limitations under the *Carr v. Thompson* doctrine. No acts of fraud were alleged in connection with the collection of that com-

mission; indeed, its recovery was sought in a separate cause of action pleaded on the express theory of money received.*

The principal had sought recovery of both commissions on the pleaded theories of the agent's actual fraud (*i. e.*, in collecting a commission from the principal without disclosing the arrangements made with the dishonest executor), his conscious participation in the dishonest executor's breach of trust, and violation of agency duty. Recovery of the commission paid by the principal was also sought on the pleaded theory of mistake of fact.** Each of these causes of action, excepting that for actual fraud was governed by the straight six-year limitation prescribed for actions *ex contractu* (C. P. A., §48 [1]) or for damages in tort (C. P. A., §48 [3]).

The Court of Appeals held that an action for money received was not within the *Carr v. Thompson* doctrine an adequate remedy for the recovery of the commission collected from the principal, because the agent who obtained that commission had not retained it, and that the principal had an action for fraud which did not accrue until the facts were discovered, the limitation for which action was not controlled by that prescribed for actions for money received. This decision, of course, ignored the fact that actions *ex delictu* for breach of agency duty or for participation in a breach of trust were available, and that both were governed by a straight six-year limitation.

If *Wechsler's* case is a deviation from the "adequacy of remedy" doctrine of *Carr v. Thompson*, the recently decided case of *Nasaba Corp. v. Harfred Corp.*, 287 N. Y. 290 (1942), appears to be a clear departure from and rejection of that doctrine. In that case defendants became parties in 1929 to conveyances in fraud of the claims of plaintiff's assignor. Plaintiff subsequently acquired these claims, and thereafter reduced them to judgment. The facts remained undiscovered until 1940, when plaintiff sued to recover dam-

* *Wechsler* record, p. 17—"Fifth Cause of Action".

** *Wechsler* record, pp. 6-16—first four causes of action pleaded in complaint.

ages for fraud. Defendants asserted and succeeded in establishing in the Appellate Division the bar of limitations (261 N. Y. App. Div. 695). The "adequacy of remedy" doctrine of *Carr v. Thompson* was the sole ground on which it was sought to defend this decision in the New York Court of Appeals. Citing the applications of that doctrine in the *Brick* and *Hearn* cases (discussed at p. 35, *supra*), defendants pointed out that an action to set aside the fraudulent conveyances (under Article 10 of the New York Debtor and Creditor law) would have permitted the recovery of the value of the property so conveyed (*Murtha v. Curley*, 90 N. Y. 372), and that the prescriptive period for such an action (C. P. A., §53) had expired in 1939. Defendants urged further that complete remedies afforded by various New York statutes had become outlawed by an even shorter statute of limitations (C. P. A., §48).

But these contentions were rejected by the New York Court of Appeals, and the judgment for defendants was unanimously reversed because the plaintiff's "causes of action" did not "owe their existence exclusively" to the statutory provisions cited by defendants, and the complaint showed that the defendants were being charged with "deliberately secret, deceitful, undisclosed and fraudulent manipulation * * *." Concluding, the Court of Appeals said:

"At least, where the complaint may be so construed as to state causes of action the prosecution of which is not barred by any statute of limitations, speculation as to what other cause of action may be sufficiently alleged to warrant recovery thereunder which may be barred by some statute of limitations should not be indulged in the absence of facts appearing upon the trial after the defenses upon which defendants rely have been presented by proper pleading and proof." (287 N. Y. 290, at 296.)

Should respondents seek to distinguish this decision placing the quietus on the "adequacy of remedy" doctrine stemming from *Carr v. Thompson*, and partially adhered to in *Wechsler v. Bowman*, *supra*, by pointing out that the

present suits were not held barred by limitations until after the issues had been exhaustively tried, the answer to such an argument, if made, is obvious. Respondents' admissions and the documents they created conclusively establish; a) that neither *Carr v. Thompson* nor *Wechsler v. Bowman* ever had application to the present suits because no remedy at law was ever available to decedent or to petitioners comparably adequate, certain and complete to that afforded in an equitable suit for an accounting; and b) no action for money received could be adequate because most of the profits derived from these frauds were neither obtained nor retained by the Bank and its officers.

CONCLUSION.

It is our submission that this petition presents questions of importance upon which there exist conflict of decision which call for resolution by this court.

Although respondents' admissions conclusively establish that upwards of \$1,500,000 in profits were realized by palpable frauds, and then parcelled out among the Bank, its officialdom, directorate and associates, we do not ask that the writ be allowed because a great amount of money is involved.

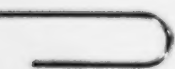
But another consideration of public moment makes it desirable that this court take jurisdiction to the end that a decision on the merits be obtained. The Bank has succeeded in defeating other claims arising out of these transactions by a course of suppression and false swearing, instances of which are adequately sampled in Note 7 to Judge Frank's opinion. (Cf. 254 N. Y. App. Div. 128.) These facts established, its fraud now goes unscourged because it has been successful in suppressing the facts until such time as it could plead the statute of limitations. It would be one thing if an obscure individual sought to capitalize on such a situation; it is submitted to be quite another where a financial institution with resources exceeding \$150,000,000 (Ex. P-169)—with all the power for good or evil that possession of such resources entails in a community the size of Buffalo—is found to be doing exactly that.

The New York statutes of limitations, even if applicable, are not a bar to the maintenance of these suits, and it is in the public interest that such proceedings be had in this court as will lead to their determination on the merits. The strictures laid by Judge Frank's opinion on the conduct and sworn statements of the Bank's officers and general counsel are such as to make it but fair to the public as well as those individuals that the merits be decided, and it is but courteous to suppose that respondents will desire this result and join in this application.

The writ of certiorari should issue.

Respectfully submitted,

ELLSWORTH C. ALVORD,
JULES C. RANDAL,
Petitioners' Counsel.



APPENDIX A.

New York Civil Practice Act, §53, governing causes in equity (*Hanover v. Morse*, 270 N. Y. 86 at 89), provided in 1928, and still provides that:

“An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues.”

Where the equity cause arises out of an actual fraud, the accrual of the cause of action is postponed until the fraud's discovery. (*Hanover v. Morse*, 270 N. Y. 86 at 91).

In 1928 New York Civil Practice Act, §48 prescribed a limitation of six years in:

“1. An action upon a contract obligation or liability express or implied * * *.”

.

“3. An action to recover damages for an injury to property * * *.”

.

“5. An action to procure a judgment on the ground of fraud. The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.”



FILED
SEP 16 1942

CHARLES E. EMMETT, CLERK

IN THE

Supreme Court of the United States

October Term, 1942.

No. 404

WYATT D. SHULTZ and CAROLYN SHULTZ, as Co-
Executors under the Last Will of Albert B. Shultz,
Deceased,

Petitioners,

vs.

MANUFACTURERS & TRADERS TRUST COMPANY,
Individually and as Co-Executor under the Last Will
of Albert B. Shultz, Deceased, *et al.*,

Respondents.

PRINCIPAL EXHIBITS REFERRED TO IN PETITION
FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

ELLSWORTH C. ALVORD,
JULES C. RANDAL,
Petitioners' Counsel.

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This pamphlet contains copies printed for the court's convenience of those original exhibits (duly filed with the clerk of this court pursuant to order of Hon. Harold P. Burke, D. J.) deemed essential to passing on this petition. These exhibits are submitted in chronological order. A numerical index follows:

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Exhibit C to Complaints (for description, see Ex. P-130)
is printed at page 21.

[Plaintiffs'] Exhibit P-54.*
(Received in evidence 11/15/40)

July 23—1928

Mr. George Rea
Manufacturers & Traders Peoples Trust Co.
Buffalo, N. Y.

My dear George:

Following our telephone conversation on Friday, I talked to my people in Detroit and find a very definite interest in the Houde Engineering Company.

I had expected to come to Buffalo tomorrow with the President of the interested company, but find that he will be out of town until the end of this week.

I agree with you entirely that it will be much more satisfactory at this stage for you to sound out this situation rather than bring in Eastman, Dillon & Co. or the potential purchaser direct. For a number of reasons which I have not explained to you, I believe that there may be an opportunity to work out something here which would be very profitable to both companies.

As I may have told you over the telephone, if a purchase were consummated of the Houde Engineering Co., other negotiations which the Detroit Company has under way at the present time would result in a substantial piece of financing, and we would naturally talk to you people about it.

If you have a recent balance sheet of the Houde Co. which you can conveniently send to me, I would appreciate it. Later in the week I will advise you when I expect to be in Buffalo.

With kind regards, I am

Yours very truly,

GNB:S

* Bears exhibit mark in previous litigation, and identified 4/3/40 as Ex. P-54 on depositions herein.

[Plaintiffs'] Exhibit P-520.*
 (Received in evidence 11/16/40)

MANUFACTURERS & TRADERS—PEOPLES TRUST COMPANY
 Buffalo, New York

July
 26th, 1928

Mr. George N. Buffington,
 Eastman Dillon and Company,
 Chicago, Illinois.

My dear George:

Thank you very much for your letter this morning. Its contents are certainly interesting, and I sincerely hope that our mutual efforts may result in successful negotiations.

As I told you over the telephone, I am perfectly sure that everybodys interests are best served by allowing us to make the approach to the Houde Company, and that in view of our other negotiations of three months ago, and the hope that we have for further negotiations at the end of this year on the part of yourself, George Courtelyou, and ourselves, I think it would be very bad to go off half-cocked and talk with them unless every evidence of serious interest was demonstrated on the part of a possible purchaser.

Every dream that the owners of the company had six months ago for the consummation of a very profitable operation has been exceeded. It is stated that their profits will run at the rate of \$1,500,000 a year, and this is very distinctly evidenced by their current large reductions in their bank loans to us.

I have evidences of the fact that the minds of the principal owners are still working along the line as when you and I last talked to them; namely that some sort of a sell out and enjoyment of some of their earned principal while they are still young enough to enjoy it appeals to them strongly, and I am quite certain in view of the last months' experience, however, that their ideas of price are apt to be

* Bears exhibit mark in previous litigation; carbon is Ex. P-55 for identification.

substantially larger than when we talked with them before. This is, of course, quite proper, as they have demonstrated the truth and soundness of their guess at that time.

I am sorry not to comply with your request for a recent balance sheet. They make no public statements, as you know, and though we are in touch with their figures constantly, it seems to me that it would not be ethical to turn over to anyone such figures as we have through our banking connection without their consent.

I should think that the plan of procedure should more properly be carried out as to first having the talk here in Buffalo with the President of the Detroit company, and yourself, and then for us to attempt to get a definite price, or option, and thereafter disclose the name of a possible purchaser with the privilege and necessity of showing to them as complete figures as we did in the previous negotiations.

It is awfully nice to be in touch with you again, and I shall look forward to hearing from you when your plans have progressed.

With very best regards, and assuring you of a welcome in Buffalo at any time, I am

Sincerely yours,

GEORGE P. REA

GPR:GW

[Defendants'] Exhibit P-56.*

(Received in evidence 11/19/40)

July 27—1928

Mr. George Rea
Manufacturers & Traders Peoples Trust Co.
Buffalo, N. Y.

My dear George:

I received your letter of July 26th this morning regarding the Houde Company, and entirely agree with you that

* Bears exhibit mark in previous litigation, and identified 4/3/40 as Ex. P-56 on depositions herein.

our interest can be best served by allowing you to approach Mr. Schultz.

I expect to talk to my people in Detroit on the telephone tomorrow, to see if it will be possible to arrange a meeting in Buffalo the early part of next week. I can assure you that this is more than a passing interest with my friends, but I, of course, do not know how far he would go with Mr. Schultz, if he is projecting his ideas of price entirely on the last three months earnings. However, I am convinced that this is a situation which warrants further discussion by the principals.

With kind personal regards, I am
Yours very truly,

GNB:S

[Defendants'] Exhibit P-57.*
(Received in evidence 11/19/40)

Letterhead of
MANUFACTURERS & TRADERS-PEOPLES TRUST COMPANY
Buffalo, New York

August 13th, 1928

Mr. George Buffington
Eastman, Dillon and Company
Chicago, Illinois.

Dear George:

Have had a preliminary conversation this morning with Mr. Schultz and find that his attitude is, in general, as I reported it to you. I do not think there is any question but what a cash offer of a price that seems reasonable to him could purchase the business in that manner.

Mr. Chisholm is away until Labor Day, and was not at the meeting this morning, and as the conversation developed it seemed to me bad psychology to crowd him to the point of definitely talking price, or option, in this first con-

* Bears exhibit mark in previous litigation, identified on 4/3/40 as Ex. P-57 on depositions herein.

versation. I had hoped that in our very first talk we might have reached this point, but, as I say, as the conversation developed I felt it best to go a little slow.

Mr. Chisholm's absence is not going to be a factor, because he can be brought back to Buffalo, if necessary, but I am sure he will agree to anything that Schultz agrees to.

I am leaving my office within a few minutes, going to the hospital to have my tonsils out, which will lay me up for a few days, and I hope not longer than that. Immediately upon my return it was left that Mr. Schultz would come down to the bank for luncheon, and give me an opportunity to at that time talk definitely with him as to an option, and as to a definite price.

You inquired about the Spicer Mfg. Company. They are making Houde instruments at the present time for Ford, and have discussed informally with Schultz his attitude and reaction toward a possible merger of the two companies. This is not in any stage where it is a matter of concern to us, and I am sure that nothing of this sort could possibly take place to upset our plans.

You will hear from me again as soon as I have anything further to report.

With very best regards.

Sincerely,

GEORGE

GPR:GW

[Defendants'] Exhibit P-58.*

(Received in evidence 11/19/40)

August 17—1928

Mr. George Rea
Manufacturers & Traders Peoples Trust Co.
Buffalo, N. Y.

My dear George,

I was sorry to hear that you have been laid up but know

* Bears exhibit mark in previous litigation, and identified 4/3/40 as Ex. P-58 on depositions herein.

that you will feel much better, now that you have had your tonsils removed.

I was very glad to know that you were able to find time to see Mr. Shultz, and I will appreciate it very much if you will advise me immediately as the matter develops further.

Looking forward to an opportunity of seeing you again in the very near future, I am

Yours very truly,

GNB:S

[Defendants'] Exhibit P-59.*
(Received in evidence 11/19/40)

August 31, 1928

Mr. George Rea
Manufacturers & Traders Peoples Trust Co.
Buffalo, New York

My dear George:

Following my telephone conversation with you a week ago Friday, I talked with Mr. Glover again, and he seems quite anxious to have certain information which I have been unable to give him, regarding the Houde Engineering Company.

As I told you when I originally talked to you, they have one or two other plans in mind on which they are working, and Mr. Glover intimated to me that one situation had progressed to a point where they would have to make a decision in the near future. I appreciate fully the way you have handled the matter to this point and realize the wisdom in not appearing anxious with Mr. Schultz, but I do believe that if possible we should be in a position to discuss something quite definite with Mr. Glover within the next week or ten days, if we expect him to become actively interested in acquiring the business.

* Bears exhibit mark in previous litigation, and identified 4/3/40 as Ex. P-59 on depositions herein.

I am merely bringing this to your attention to keep you posted upon my negotiations with the people in Detroit to date.

With kind regards, I am

Yours very truly,

GNB :S

[Defendants'] Exhibit P-60.*

(Received in evidence 11/19/40)

Letterhead of

MANUFACTURERS & TRADERS-PEOPLES TRUST COMPANY

Buffalo, New York

September 4th, 1928

Mr. George Buffington

Eastman, Dillon and Company

Chicago, Illinois

Dear George:

Thank you very much for your letter today. I appreciate exactly your position with Mr. Glover, and we are moving to a definite point with Schultz just as fast as we can.

I had already tried this morning, before your letter came, for an appointment with him this afternoon, only to find that they were not back yet, but expected tomorrow. I have to be in New York tomorrow, but that should mean that we should be able to consummate another appointment not later than Thursday, or Friday.

I shall report again the moment that there is something to say.

With very kind regards.

Sincerely,

GEORGE

GPR :GW

* Bears exhibit mark in previous litigation, and identified 4/3/40 as Ex. P-60 on depositions herein.

[Defendants'] Exhibit P-61.*

(Received in evidence 11/19/40)

Letterhead of

MANUFACTURERS & TRADERS-PEOPLES TRUST COMPANY

Buffalo, New York

September 4th, 1928

Mr. George Buffington

Eastman, Dillon and Company

Chicago, Illinois

Dear George:

Since writing you this morning I got in touch with Mr. Schultz, who refuses to do anything without consultation with Mr. Chisholm. Mr. Chisholm it now seems is not going to be here until sometime Thursday. Also Mr. Schultz has suddenly decided to take a month's vacation in Europe, and leaves for that purpose Thursday night.

We have urged Mr. Schultz strongly in every way that we could think of to get in touch with Mr. Chisholm by wire, or by telephone, so that we could function, but this he flatly refuses to do, and says that he will not discuss a definite option, or a definite price with us until he has had a chance to sit down and calmly talk it over with Mr. Chisholm.

We are going to make every effort to get them together on Thursday, and it is conceivable that we will be successful. We shall do everything possible, but it is a very bad break, and may, of course, mean the impossibility of a definite option for another month.

I shall report to you by telephone on Friday.

Sincerely yours,

GEORGE

* Bears exhibit mark in previous litigation, and identified 4/3/40 as Ex. P-61 on depositions herein.

[Defendants'] Exhibit P-62.*

(Received in evidence 11/19/40)

Letterhead of

MANUFACTURERS & TRADERS-PEOPLES TRUST COMPANY
Buffalo, New York

September 6th, 1928

Mr. George Buffington
Eastman, Dillon and Company
Chicago, Illinois

Dear George:

I tried to wire you this afternoon about 4:30 over your wire; also tried to telephone you at your Chicago office, but found you had gone for the day. It is true that things are not very busy, but I wish I had a plutocratic 4:30 job myself.

I have very bad news to report, for which I am very sorry, but there is no way of avoiding it. It is just one of those bad breaks that come. Mr. Chisholm was delayed en route, and did not return today. Mr. Schultz leaves, according to schedule, for his vacation in Europe tonight—once more absolutely refusing to talk definitely without Mr. Chisholm here. I tried very hard to have him use wires, or telephone, but to no avail. He simply would not function without having a conference with Mr. Chisholm.

Not a thing can be done now until Mr. Schultz returns October 1st. Whether you can stall until then or not, I do not know, but hope that perhaps you may find it wise to try, because I am hopeful that an option at a reasonable price can be obtained when Mr. Schultz gets back.

With best regards.

Sincerely,

GEORGE

* Bears exhibit mark in previous litigation, and identified 4/3/40 as Ex. P-62 on depositions herein.

[Plaintiffs'] Exhibit P-98.*
(Received in evidence 10/29/40)

September 26th, 1928.

IN CONSIDERATION of \$1.00 receipt of which is hereby acknowledged, we the undersigned stockholders of the Houde Engineering Corporation, hereby give to Krauss & Company, for a period of thirty (30) days from the date hereof, the right to purchase all the stock of the Houde Engineering Corporation at a price of (\$4,000,000) Four Million Dollars in total. This option can only be exercised by the payment of cash before its expiration.

It is understood that the net assets of the Houde Engineering Corporation, when, as, and if this option shall be exercised will be at least equivalent to the position as set forth in its balance sheet dated August 31st, 1928, and any accrual in these net assets occurring since the close of business August 31st, 1928 shall adhere to the vendors in this option.

Inasmuch as Krauss and Company will act as a broker in this transaction, it is also understood that in the event of the sale of said stock being consummated, Krauss and Company will be entitled to a commission from the purchase price of 3%.

If stockholders owning not more than a total of 265 shares of said stock, who do not sign this option, refuse to join in the sale at the price aforesaid, there shall be a reduction made in the purchase price of \$1,640.19 per share for each share of said stock which the undersigned shall be unable to deliver to the purchasers.

It is understood that the name of A. B. Shultz is signed hereto in pursuance of verbal authority given by him to negotiate a sale of said stock.

A. B. SHULTZ,
By G. H. Chisholm.

* Identified 4/3/40 as Ex. P-98 on depositions herein, and bears exhibit marks in previous litigation.

GEORGE H. CHISHOLM,
V.-Pres.

HARRY L. CHISHOLM,
Treas.

B. D. SHULTZ,
Secretary.

J. N. SOULLY,
V. P. Director.

[Defendants'] Exhibit P-99.*

(Received in evidence 12/3/40)

September 26, 1928

IN CONSIDERATION of \$1.00, receipt of which is hereby acknowledged, we the undersigned stockholders of the Houde Engineering Corporation hereby give to Krauss & Company, for a period of thirty (30) days from the date hereof, the right to purchase all the stock of the Houde Engineering Corporation at a price of (\$4,000,000) Four Million Dollars in total. This option can only be exercised by the payment of cash before its expiration.

It is understood that the net assets of the Houde Engineering Corporation, when, as, and if this option shall be exercised will be at least equivalent to the position as set forth in its balance sheet dated August 31, 1928, and any accrual in these net assets occurring since the close of business August 31, 1928 shall adhere to the vendors in this option.

Inasmuch as Krauss and Company will act as a broker in this transaction, it is also understood that in the event of this option being exercised Krauss & Company will be entitled to a commission from the purchase price of 3%.

.....
.....
.....
.....

* Bears exhibit marks in previous litigation and identified 4/3/40 as Ex. P-99 on depositions herein.

[Defendants'] Exhibit P-100.*

(Received in evidence 12/3/40)

It is understood that the name of A. B. Shultz is signed
 authority to negotiate a sale. ~~at said price~~
 hereto in pursuance of verbal instructions ~~^ given by him~~
 before leaving for Europe.

If stockholders owning not more than a total of 265 shares
 of said stock, who do not sign this option, refuse to join
 in the sale at the price aforesaid, there shall be a reduction
 made in the purchase-price of \$1,640.19 per share for each
 share of stock not delivered to the purchasers.

			yes	(?)
	A. B. S.	1,125	1,125	
	H. C.	300	300	
	G. C.	300	300	
	B D S	282 $\frac{1}{4}$ x	282 $\frac{1}{4}$	
131 $\frac{1}{4}$	J S	131 $\frac{1}{4}$	131 $\frac{1}{4}$	
131 $\frac{1}{4}$	F S	131 $\frac{1}{4}$		131 $\frac{1}{4}$
<hr/>				
262 $\frac{1}{2}$	H P	18 $\frac{1}{4}$ x		18 $\frac{1}{4}$
	McKaig	37 $\frac{1}{2}$		37 $\frac{1}{2}$
	Zw.	18 $\frac{1}{4}$ x		18 $\frac{1}{4}$
	H. Est.	37 $\frac{1}{2}$		37 $\frac{1}{2}$
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			2,176	
<hr/>				
B5696-W				
	2438 $\frac{3}{4}$	1125		
	2438.75	600		
	1590	281 $\frac{1}{4}$		
		131 $\frac{1}{4}$		
	21948750	37 $\frac{1}{2}$		
	1219375			
	243875	2175.	2438.75	
			2175	
	3,877,612.50			
			263	

* Identified 4/3/40 as Ex. P-100 on depositions herein.

Statement that Bert's name is signed by verbal auth only
Commission only in case sale is made

Statement that if cannot deliver shares of any Sk not
signing there shall be a pro rata red in price.

2438.75) 4,000,000.00 (164.0-18
2 438.75

1 561 250
~~1 214 375~~

41 875
1 463 250

98 000 0
97 550 0

2438.75
164.01

450 0000
243 875

2 4 38.75
9 75 5 00 0
146 32 5 0
24 3 87 5

206 1250
2438.75
164.01

39,9,97,9.38.75

24 38.75
9755 00 0
1 46325 0
2 43875

3,99979.38 75

[Plaintiffs'] Exhibit P-101a.*

(Received in evidence 10/29/40)

Buffalo, N. Y.

October 11, 1928.

Messrs. A. B. Shultz, George H. Chisholm,
Harry Chisholm, B. Shultz and J. Scully:

Dear Sirs:

Referring to the option dated September 26, 1928, which
you have given us for the purchase of all of the stock of

* Carbon copy identified 4/4/40 as Ex. P-101 on depositions herein.

Houde Engineering Corporation at a price of \$4,000,000.00 we beg to advise you that we have secured as a purchaser the New York Car Wheel Company of this City, which has agreed to purchase said stock upon the terms of our option, and has made available in our hands the sum of \$4,000,000.00 therefor.

We accordingly notify you that we elect to exercise our option as of this date, and tender you payment in full upon delivery to us of all the stock of the Houde Engineering Corporation duly endorsed for transfer, less a possible maximum of 265 shares, all as provided in our option.

We shall be glad to suit your convenience as to time and place of delivery, and payment prior to October 25th, and suggest that you promptly arrange with us for an early closing.

Yours very truly,

KRAUSS & COMPANY
By T. Cantwell

[Defendants'] Exhibit P-102a.*

(Received in evidence 10/30/40)

September 28, 1928

A. B. Shultz
Hotel Pierre Premier
PARIS, FRANCE

Looks as if sale will go through if can take prompt action. Price Four Million cash for all stock. All others have agreed. Please cable me immediately authority to act for you and Clare. No need hastening your return.

G. H. CHISHOLM.

FULL RATE CABLE

* Identified 4/4/40 as Ex. 105A on depositions herein.

[Defendants'] Exhibit P-104a.*

(Received in evidence 10/30/40)

Postal Telegraph

Cable form

9/29 1928

To Paris

Cables received George Chisholm arrange telephone me
Paris Louvre 07-91 Cable Pierre time of cable

Shultz

Recd

9 00

M.D.

W. F. Hennesy 79 Greenwood
Dave Bid. 4325

* Identified 4/4/40 as Ex. P-104-A on depositions herein.

[Plaintiffs'] Exhibit P-105a.*

(Received in evidence 10/28/40)

Postal Cablegram

A. B. Shultz

Hotel Pierre Premier

Paris France

Manufacturers Bank trying to get best price possible acting in our interests. Option four million cash minimum. Commission three percent. Believe can effect sale now under present financial and industrial conditions which may change. We are pessimistic if delay necessary. Purchaser would buy capital stock assuming all assets and liabilities August thirty first. Profits since come to us in addition. We feel future competition uncertain and all agree wise to take sure thing. Any or all present organization remain if wish. Purchaser's attitude hope they stay. Please cable

* Identified 4/4/40 as Ex. 105a on depositions herein.

authority to act for you and Clare. Am afraid may lose opportunity if wait your return. Prospects Timken Bendix third party unknown.

(s) G. H. CHISHOLM

[Plaintiffs'] Exhibit P-106a.*

(Received in evidence 10/30/40)

Message Memorandum

October 1 1928

To

POSTAL TELEGRAPH-CABLE COMPANY

For convenience in verifying accounts,
please preserve the following items of
messages sent.

To	137 WORD CABLE INCLUDING PC AND FIVE WORDS PC PREPAID CABLE TO A B SHULTZ PARIS CABLE ACKNOWLEDGMENT OF RECEIPT	\$ CTS. \$ 35 37 1 35
From	G H CHISHOLM	
	Total,	\$ 36 72
(Signature)	Postal Tel Co. Per C. Mason	

* Identified 4/4/40 as Ex. P-106A on depositions herein.

[Plaintiffs'] Exhibit P-108.*

(Received in evidence 10/29/40)

7NYMN 650 AM 15 VIA COML
PARIS OCT 2 1928 1149AM

* Identified 4/4/40 as Ex. P-108 on depositions herein.

GEORGE CHISHOLM ATLASTEEL

BUFFALO.

OPTION AS CABLED HAS OUR APPROVAL

OBVIH (leaving today for) SWITZERLAN

OJABEMEHUV (will return by Saturday)

HERE.

SHULTZ

[Plaintiffs'] Exhibit P-112.*

(Received in evidence 11/5/40)

MEMORANDUM in RE HOUDE ENGINEERING CORPORATION.

On September 26th certain stockholders of the Houde Engineering Corporation gave an option to Krauss & Company to purchase their holdings of stock in the Houde Engineering Corporation; Krauss & Company, through Mr. Rea secured the New York Car Wheel Company as the purchaser of this stock.

It is the intention, and mutual understanding, of Messrs. Harriman, Rea, and Wurst, of the Manufacturers & Traders-Peoples Trust Company, and Mr. Fred B. Cooley, President of New York Car Wheel Company, that in the event of the death or disability of Mr. Cooley before the organization of a syndicate hereafter mentioned Messrs. Harriman, Rea, and Wurst, will take over the obligation of the New York Car Wheel Company to complete the purchase of the Houde Engineering Corporation stock, and hold it (The New York Car Wheel Company) harmless from all its obligations in that respect; and Mr. F. B. Cooley, as President of the New York Car Wheel Company agrees for that company, or its assigns, that in the event of his death or disability, that Messrs. Harriman, Rea, and Wurst, shall succeed to all the rights of the New York Car Wheel Company to purchase said stock.

*Bears exhibit marks in previous litigation as well as being identified on 4/4/40 as Ex. P-112 on depositions herein.

It is the intention of the New York Car Wheel Company presently to form a syndicate with the assistance of the officials of the Trust Company, above mentioned, to take over from it a substantial amount of the stock which the New York Car Wheel Company has elected to purchase under the Krauss & Company option; this amount to be taken over from the New York Car Wheel Company to relieve it of approximately the amount of \$3,500,000.00 of a total purchase of \$4,000,000.00.

It seems best not to form this syndicate for possibly three or four days from date, but the officials of the Trust Company have signified their ability and readiness to do so.

This memorandum is intended to set forth the intention of the parties to it, in the event of the death, or disability, of Mr. Fred B. Cooley, and prior to the formation of the Syndicate as stated above.

PERRY E. WURST
LEWIS G. HARRIMAN
GEORGE P. REA
F. B. COOLEY

October 11, 1928

[Plaintiffs'] Exhibit P-113.*
(Received in Evidence 11/19/40)

Buffalo, N. Y.
October 13, 1928.

Messrs. Lewis G. Harriman,
Perry E. Wurst,
George P. Rea.

Gentlemen:—

Through the agency of the Manufacturers and Traders-Peoples Trust Company, which held an option to purchase the stock of the Houde Engineering Corporation, the New York Car Wheel Company, of which I own control, has undertaken to purchase this stock at a price of approximately

* Identified 4/4/40 as Ex. P-113 on depositions herein.

\$4,000,000.00 in accordance with the terms of the option held in the name of Krauss and Company.

You individually, and personally, have undertaken to relieve the New York Car Wheel Company of this obligation to purchase, in case of my death, and you have also undertaken to refinance the Houde Engineering Corporation for me.

Negotiations are now pending for an immediate resale of the stock of this corporation at a profit; thus obviating the necessity of any refinancing, to a subsidiary of the General Motors Corporation. These negotiations were instituted by Mr. John R. Oshei, and if they are consummated it is my intention to pay Mr. Oshei a proper sum for his services, and after the other expenses are paid, it is my intention to divide the net profit as follows:

50% to the Manufacturers & Traders-People Trust Co.
and Western New York Investors, Inc. jointly

7½% Mr. Harriman

7½% Mr. Wurst

15% Mr. Rea.

retaining 20% myself.

In case this sale is not consummated, it is contemplated that an underwriting syndicate be organized, in which we shall participate individually, in which the bank and Western New York Investors, Inc., will be permitted to participate; and also such other individuals, and corporations, as we shall agree upon, including—Central Trust Company of Illinois, and Eastman, Dillon and Company, who were originally interested in refinancing this corporation.

I expect such plan of refinancing to provide that 25% of the net profit shall be retained by me and you as my associates, to be divided among us on the following basis:

15% Mr. Harriman

15% Mr. Wurst

30% Mr. Rea

40% Myself

(signed) F. B. COOLEY.

[Plaintiffs'] Exhibit P-116b.*
 (Received in Evidence 10/30/40)

Buffalo, N. Y., October 22nd, 1928.

RECEIVED OF B. D. SHULTZ

Certificate of stock representing One hundred (100) shares of the HOUDE ENGINEERING CORPORATION, endorsed in blank, to be delivered to New York Car Wheel Company or its nominee when at least all of the outstanding stock of said company, except two hundred sixty-five (265) shares, have been deposited with the undersigned depository. Delivery is to be made pursuant to the terms of an option, dated September 26, 1928, given to Krauss & Company. The price per share is to be at the rate of Four Million Dollars (\$4,000,000) for the entire issued and outstanding stock of said Houde Engineering Corporation, in addition to such sum per share as shall be certified to represent earnings since September 26th, 1928, as certified to the undersigned by Ernst & Ernst, less a commission of Three percent. (3%) which is to be retained by you and paid to Krauss & Co.

MANUFACTURERS & TRADERS-PEOPLES TRUST COMPANY

By (s) Perry E. Wurst
Executive Vice President

Plaintiffs' Exhibit P-542.†
 (Received in Evidence 11/18/40)

October 24th, 1928.

RECEIVED of New York Car Wheel Company, by Fred B. Cooley, the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00), part payment on a total of One Million Eight Hundred Eighty Four Thousand Ninety-one and 91/100 Dollars, (\$1,884,091.91), which is the full amount due me for One Thousand One Hundred Twenty-five (1,125) shares of

* Identified 4/4/40 as Ex. P-116B on depositions herein.

† Identified 11/18/40 as Ex. P-542 on the trial herein.

the Capital Stock of Houde Engineering Corporation, sold and delivered under the terms of an option dated September 26th, 1928, given to Krauss & Co., the three percent (3%) commission allotted to the latter having been deducted from the sale price. The balance is to be paid to me on demand, except that I may be permitted to take stock of a new corporation in part payment of the balance.

It is understood that I am repaying to Fred B. Cooley the sum of Fifty Thousand Dollars (\$50,000.00), being the amount paid by him to settle the claim of Francis P. Scully and James N. Scully against me.

(s) ALBERT B. SHULTZ

We undertake to see that payments are made to A. B. Shultz, in accordance with the terms of the above receipt, on demand.

MANUFACTURERS & TRADERS-PEOPLES TRUST COMPANY
By (s) Perry E. Wurst
Executive Vice President

Exhibit C to Complaints.*

"October 24th, 1928.

RECEIVED of New York Car Wheel Company, by Fred B. Cooley, the sum of Two Hundred Nineteen Thousand Eight Hundred Ten and 73/100...Dollars, (\$219,810.73), in full payment for one hundred thirty-one and one-quarter (131 $\frac{1}{4}$) shares of the Capital Stock of Houde Engineering Corporation, sold and delivered under the terms of an option dated September 26, 1928, given to Krauss & Co., the three per cent (3%) commission allotted to the latter having been deducted from the sale price.

JAMES N. SCULLY.

*This exhibit was received in evidence as defendants' Ex. P-130 on 10/30/40; it bears exhibit marks in previous litigation, and was identified 4/4/40 as Ex. P-130 on depositions herein. The answer of the Bank, Wurst, *et al.*, admits that this exhibit is similar in form to the receipts signed by the other stockholders [1 51].

[Defendants'] Exhibit D-4.*
(Received in evidence 11/1/40)

SYNDICATE AGREEMENT
HOUDE ENGINEERING CORPORATION SYNDICATE
November 1, 1928.

1. The Subscribers hereby associate themselves as, and shall constitute, a Syndicate for the purpose of buying from New York Car Wheel Company of Buffalo, N. Y., 2438- $\frac{3}{4}$ shares, being all of the outstanding capital stock of Houde Engineering Corporation at the cost of said stock to said New York Car Wheel Company, and for the purpose of supplying additional working capital to said Houde Engineering Corporation. Said cost shall consist of:

(a) The actual price paid by said New York Car Wheel Company for said stock, which is based on the total price of \$4,000,000.00 for all the outstanding stock of said Company, plus accruals from August 31st to October 11th, 1928.

(b) Interest, counsel fees, disbursements and all necessary and proper expenses of New York Car Wheel Company incurred in the purchase and carrying of said stock.

The New York Car Wheel Company has deferred its profit in the transaction as hereinafter provided.

2. The Subscribers shall participate pro rata in the Syndicate to the extent of the amounts set opposite their respective names, and agree to pay for subscriptions on call of the Syndicate Managers, as hereinafter provided. The Subscribers further agree, if the Syndicate Managers determine that the Houde Engineering Corporation, or its successor, requires additional working capital, to pay additional amounts pro rata, not exceeding twenty-five per cent (25%) of their respective subscriptions as and when called upon by the Syndicate Managers. All Participations are

* Identified 4/1/40 as Ex. D-4 on depositions herein. Exs. D-8, P-178/9 are copies or carbon copies of this exhibit, except for names of syndicate subscribers [v., I 494-5]

payable at the time and place designated in such call of the Syndicate Managers, and calls not paid on the date so fixed shall be charged with interest at the rate of six per cent (6%) per annum.

3. The Syndicate Managers will issue to the Subscribers Certificates of Participation in the Syndicate after payments are made. Certificates of Participation shall be in such form as the Syndicate Managers shall determine and may, in the discretion of the Syndicate Managers, be registered by such Trust Company as they may designate as Registrar of such Certificates.

4. Frederick B. Cooley, Lewis G. Harriman and
are hereby constituted Syndicate Managers under this agreement. In the event of the death, permanent disability or resignation of any Syndicate Manager, his place shall be filled by the remaining Syndicate Managers; and upon the failure of the remaining Syndicate Managers to fill any such vacancy or vacancies within sixty (60) days after they occur, the majority in amount of participants may fill the same by written designation delivered to the Registrar, or to the holders of Certificates of Participations. Wherever the Syndicate Managers are referred to in this agreement it refers to the Syndicate Managers actually acting as such. The Syndicate Managers assume no personal obligation or liability in the management of the Syndicate and shall be liable only for their bad faith or wilful misconduct.

5. The Syndicate Managers shall be vested with entire and sole power to manage and conduct the Syndicate. Without limit upon the generality of the foregoing they shall have and exercise all of the rights and powers of the Syndicate as stockholders of Houde Engineering Corporation, or any successor or other corporation in which the Syndicate may own stock, to the full extent of all capital stock at any time purchased or owned by the Syndicate. To that end they shall have the right, if they shall deem it necessary or advisable, to cause all Syndicate stock of Houde

Engineering Corporation, or any successor or other Corporation, to be transferred to their names, but for the benefit of the Syndicate. For the purpose of more effectively vesting the specific powers above enumerated in the Syndicate Managers each of the Subscribers does hereby constitute the Syndicate Managers his or its true and lawful attorney, during the continuance of the Syndicate, in his or its name, place and stead, to vote all stock of Houde Engineering Corporation, or any successor or other Corporation which may have been purchased and/or owned by the Syndicate and distributed to the participants, as fully as he or it could do if personally present, hereby ratifying and confirming all acts or things done or performed by virtue hereof. The Syndicate Managers shall have the right to purchase, contract for the purchase, sell, repurchase and resell stock of Houde Engineering Corporation and of its successors; to borrow money for account of the Syndicate at such interest rates and upon such terms as they may determine; to pledge or otherwise charge as security for such borrowings, the assets of the Syndicate in whole or in part, including any unpaid obligations of the participants. The Syndicate Managers shall have the right to organize or cause to be organized, or to join with others in the organization of a Corporation under the laws of such State as they may determine, and to transfer to such Corporation all or any part of the Syndicate assets in exchange for cash and/or stock in such Corporation. The Syndicate Managers shall have the right to cancel and forfeit to the Syndicate, or to resell, any Participation upon failure of the participant to make payment of all of his Participation when called in accordance with this agreement, or upon the failure of any participant to perform any part of his obligation hereunder. Failure on the part of one participant to pay or to perform his obligation hereunder shall not relieve any other participant. The Syndicate Managers may employ such agents, counsel and others in whatever capacity as they may deem proper; all for

the account of the Syndicate and at its expense. The Syndicate Managers shall act without compensation.

6. The Syndicate is organized for the period of one year from its date, subject, however, to the right of the Syndicate Managers to extend the same for a further period or periods not exceeding one year from the expiration of said original term by ten days written notice to participants. The Syndicate Managers may, from time to time, distribute shares of stock and/or any profits from the Syndicate operation and the same shall be distributed pro rata to the participants.

7. The Syndicate Managers may terminate this Syndicate at any time upon ten (10) days' notice to the participants. Upon the expiration or termination of the Syndicate, and after the payment of all Syndicate obligations, the assets shall be distributed as follows:

Any assets other than cash, (including any assets theretofore distributed to participants) shall be appraised by the Syndicate Managers to determine the basis of the cost thereof to the Syndicate, in accordance with the Federal Income Tax Law and Regulations controlling such cost basis, for the purpose of determining the profit or loss resulting from the Syndicate operation. Twenty-five per cent (25%) of any net profit resulting from the Syndicate operation shall first be paid to New York Car Wheel Company, or its assigns, as its profit upon the sale of Houde Engineering Corporation stock to the Syndicate; such payment to be made partly in cash and partly in other assets (if any) at their value as appraised, in the proportion which total Syndicate cash bears to total Syndicate other assets at their value as so appraised (including any cash or other assets theretofore distributed to the participants); provided, however, that in determining the amount of profits for the purpose of arriving at the payment to New York Car Wheel Company, no account shall be taken of any sums paid in for additional working capital, and similarly no account shall be taken of the net earnings of the busi-

ness, whether distributed by way of dividends or not. All assets of the Syndicate remaining after such payment to New York Car Wheel Company shall be distributed pro rata to the participants in like proportions to each participant of cash and other assets, if any.

8. All expenses of the Syndicate Managers, including brokerage commissions, counsel fees and all other disbursements and expenses made by them in connection with the carrying out of the purpose of this agreement shall be charged to the Syndicate and shall be divided, borne and paid pro rata by the Syndicate Participants upon call of the Syndicate Managers. Nothing in this agreement shall be construed as constituting the Subscribers or Participants partners with each other, or with the Syndicate Managers, it being expressly agreed that the liability of each Subscriber or Participant is limited to the amount of his Participation, the amount of any call for additional working capital not exceeding twenty-five per cent (25%) of his Participation, and his pro rata share of the expenses of the Syndicate.

9. The Syndicate Managers may be subscribers to the Syndicate and to the extent of any subscription shall participate in the profits and losses to the same extent as other Subscribers.

10. All calls and notices upon or to participants shall be made or given by the Syndicate Managers, or their agents or nominees, and shall be sufficient if mailed, registered, to the participants at their addresses of record with the Syndicate Managers or the Registrar of the Certificates.

11. This agreement shall bind the Subscribers and their respective successors, assigns and personal representatives. It may be made or signed in several counter-parts, but all such counter-parts shall be taken as one original instrument. The holding of Certificates of Participation shall constitute such holders parties to the agreement as fully to all intents and purposes as if signing the same.

IN WITNESS WHEREOF, the Syndicate Managers have subscribed an original hereof and the Syndicate Subscribers have subscribed said original or counterparts thereof, as of the day and year first above written.

.....

SYNDICATE SUBSCRIBERS

<i>Name</i>	<i>Address</i>	<i>Amount of Subscription</i>
Lewis G. Harriman	% M and T-Peoples Trust Co.	\$250,000
Perry E. Wurst	"	250,000.
Harry T. Ramsdell		250,000 —
Ralph Hochstetter		500,000.—
E. C. Andrews		250,000 —
Albert D. Sykes		50 000
D. J. Kenefick		50,000.
Bradley Goodyear		50,000
Eugene J. McCarthy		50,000
A. B. Shultz		250,000.00
F. B. Cooley		500,000.00

[Defendants'] Exhibit P-140.*

(Received in evidence 11/27/40)

Buffalo, N. Y.

December 6th, 1928.

RECEIVED OF FRED B. COOLEY, the sum of One Million Six Hundred Thirty-four Thousand Ninety-one and 91/100 Dollars, (\$1,634,091.91) together with interest thereon at four percent (4%) from October 24th to December 1st, amounting to Six Thousand Seven Hundred Seventeen and 93/100 Dollars (\$6,717.93), being the balance

* Identified 4/4/40 as Ex. P-140 on depositions herein.

in full due me on account of the purchase price of my stock in Houde Engineering Corporation.

These payments were received by me through the deposit of Two Hundred Thousand Dollars (\$200,000) to my account in the Manufacturers & Traders-Peoples Trust Company on December 3, 1928; the deposit of Six Thousand Seven Hundred Seventeen and 93/100 (\$6,717.93), made to my account on December 5, 1928; and the issuance to me by the Manufacturers & Traders-People Trust Company of two (2) Certificates of Deposit for Five Hundred Thousand Dollars (\$500,000) each, four (4) Certificates of Deposit for One Hundred Thousand Dollars (\$100,000) each, and one (1) Certificate of Deposit for Thirty-Four Thousand Ninety-one and 91/100 Dollars (\$34,091.91), all dated December 5th, 1928 and bearing interest from December 1st, 1928 on full calendar months only, at the rate of 2% per annum if left one month, 3% per annum if left two months and 4% per annum if left three months, which deposits and certificates were all made and issued in accordance with my instructions to Mr. Wurst.

A. B. SHULTZ.

[Defendants'] Exhibit P-141.*

(Received in evidence 11/27/40)

Letterhead of

MANUFACTURERS & TRADERS-PEOPLES TRUST COMPANY
Buffalo, N. Y.

December
6th, 1928.

Mr. A. B. Shultz,
537 East Delavan Avenue,
Buffalo, N. Y.

Dear Mr. Shultz:

Below you will find a statement covering the sale of your 1125 shares of stock to Fred B. Cooley:

* A carbon copy was identified 4/4/40 as Ex. P-141 on depositions herein.

Oct. 24, 1928

Delivered 1125 shares Houde Engineering
stock, after deduction of commission, at\$1,884,091.91
Payment made to you on account purchase
price 250,000.00

Balance due you as of this date.....\$1,634,091.91

Dec. 1, 1928

Interest on \$1,634,091.91 from October 24th to
December 1st, 1928, 1 month 7 days, at 4%.. 6,717.93

\$1,640,809.84

The above sum was paid to you as follows:

Deposited to your checking a/c
Dec. 3rd\$ 200,000.00

Deposited to your checking a/c
Dec. 5th 6,717.93

Certificates of Deposit issued
Dec. 5th, 1928, in your name as
follows:

2 at \$500,000 each..\$1,000,000.00

4 at 100,000 each.. 400,000.00

1 at 34,091.91 ... 34,091.91

(Above Certificates bear interest
from Dec. 1, 1928)

1,434,091.91 \$1,640,809.84

Enclosed herewith is a copy of the receipt you gave me
covering the above payments to you.

Very truly yours,

PERRY E. WURST.

SEP 16 1942

CHARLES ELMORE CROPLEY
CLERK

19
No. 404

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

WYATT D. SHULTZ, and One, as Co-Executors under the
Last Will of Albert B. Shultz, Deceased,
Plaintiffs-Appellants,

against

MANUFACTURERS & TRADERS TRUST COMPANY,
Individually and as their Co-Executor, etc., *et al.*,
Defendants-Appellees.

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Dfts. Ex. P-78—Carbon of letter Buffington to Barnes, dated Nov. 2, 1928. Received in evidence at Fol. 2957	2721
Dfts. Ex. D-78—Time slip of Joseph H. Morey, dated Nov. 16, 1928. Received in evidence at Fol. 6078	2723
Pl. Ex. P-80 (Id.)—Photostat of Plaintiffs' Ex. P-421	2356
Pl. Ex. P-81 (Id.)—Photostat of Plaintiffs' Ex. P-422	2356
Pl. Ex. P-83 (Id.)—Carbon of telegram Rea to Barnes, dated Nov. 15, 1928. Received in evidence at Fol. 2968	2357
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Pl. Ex. P-86—Letter Rea to Buffington, dated Nov. 20, 1928. Received in evidence at Fol. 2969	2360
Pl. Ex. P-87 (Id.)—Photostat of Defendants' Exhibit P-182. Received in evidence at Fol. 2970. (Withdrawn at 3518)	2361
Pl. Ex. P-88—Letter Harris, Small & Co. to Syndicate Managers, dated Nov. 20, 1928. Plaintiffs' Ex. P-315 for identification from the files of the defendant Sawyer is a carbon copy of this exhibit. Received in evidence at Fol. 2970. .	2362
Dft. Ex. P-89—Letter Central Trust Company to Rea, dated Nov. 21, 1928. Received in evidence at Fol. 2862	2725
Pl. Ex. P-90 (Id.)—Telegram Harris, Small & Company to defendant Bank, dated Nov. 21, 1928. This telegram is quoted in Plaintiffs' Ex. P-91. (See stipulation at 3503)	2363
Pl. Ex. P-91—Letter Beaumont, Smith & Harris, to defendant Bank, dated Nov. 21, 1928. This letter quotes Plaintiffs' Ex. P-90 for identification on the depositions. Received in evidence at Fol. 2970	2364
Pl. Ex. P-92—Carbon of letter defendant Wurst to Continental National Bank & Trust Company, dated Nov. 21, 1928. Received in evidence at Fol. 2969	2365
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Pl. Ex. P-95—Carbon of letter Rea to Beaumont, Smith & Harris, dated Nov. 23, 1928. Received in evidence at Fol. 2971	2368
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Pl. Ex. P-98—Instrument of Sept. 26, 1928, executed by certain of Houde's stockholders. Received in evidence at Fol. 984 (and see stipulations at 1494, 1551)	2370
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Dfts. Ex. P-100—Two yellow sheets of paper containing longhand notes of Irving L. Fisk. Received in evidence at Fol. 4568	2729
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Dfts. Ex. P-102a—Carbon of cable G. H. Chisholm to A. B. Shultz, dated Sept. 28, 1928. Received in evidence at Fol. 1207	2733
Dfts. Ex. P-103—Carbon of cable defendant Bank to its Paris Office, dated Sept. 28, 1928. Received in evidence at Fol. 1214	2734
Dfts. Ex. P-104a—Copy of Plaintiffs' Exhibit P-104b. Received in evidence at Fols. 1208, 2932	2735
Pl. Ex. P-104b—Cable A. B. Shultz to G. H. Chisholm, dated Sept. 29, 1928. Received in evidence at Fol. 2932	2372
Pl. Ex. P-105a—Copy of 137-word cable G. H. Chisholm to A. B. Shultz. Received in evidence at Fol. 783	2373
Pl. Ex. P-106a—Receipt of Postal Telegraph-Cable Company, dated Oct. 1, 1928, for 137-word cable. Received in evidence at Fol. 1109	2374

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Dfts. Ex. P-107—Confirmation of cable Postal Telegraph Company to G. H. Chisholm. Received in evidence at Fol. 1214	2736
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Pl. Ex. P-112—Memorandum dated Oct. 11, 1928, signed by defendants Wurst, Harriman, Rea and Cooley. Received in evidence at Fols. 1450, 1506 (and see stipulations at 1480, 4073, 4267-8)	2376
Pl. Ex. P-113—Copy of instrument signed by defendant Cooley addressed to the defendants Harriman, Wurst and Rea, bearing date Oct. 13, 1928. Received in evidence at Fol. 2958 (and see statements at 524-6, 5943, 6766)	2377
Dfts. Ex. P-114—Carbon of audit report of Ernst & Ernst on Houde, dated Oct. 20, 1928, covering examination of books as of the close of business Sept. 30, 1928. Received in evidence at Fol. 3387	2747
Pl. Ex. P-116b—Depositary receipt of defendant Bank to B. D. Shultz, dated Oct. 22, 1928. Received in evidence at Fol. 1127	2378
Pl. Ex. P-117—Letter Ernst & Ernst to the defendant Bank, dated Oct. 23, 1928. Received in evidence at Fol. 1476 (and see stipulation at 1342)	2379
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- Dfts. Ex. P-120—Original ribbon copy of agreement between Cooley and the Sculleys, dated Oct. 22, 1928, signed by defendant Cooley only, and containing statement endorsed thereon in handwriting and signed by A. B. Shultz. Received in evidence at Fol. 3375 (and see stipulation at 1307) 2750
- Dfts. Ex. P-121—Carbon of Defendants' Exhibit P-120, signed by defendant Cooley and the Scullys. Received in evidence at Fol. 1028 2751
- Dfts. Ex. P-122—Carbon of letter J. N. Scully to Directors of Houde, dated Oct. 22, 1928. Received in evidence at Fol. 1027 2754
- Dfts. Ex. P-123—Undated assignment of stock of Houde signed by Frank P. Scully. Received in evidence at Fol. 1028..... 2755
- Dfts. Ex. P-124—Letter Frank P. Scully addressed to M. & T.-Peoples Trust Company and New York Car Wheel Company, dated Oct. 22, 1928. Received in evidence at Fol. 1032 2757
- Dfts. Ex. P-125—Receipt executed by James N. Scully and Francis P. Scully, by his attorneys, dated Oct. 24, 1928. Received in evidence at Fol. 1027 2757
- Pl. Ex. P-126—Statistical table used on closing of Houdaille. Received in evidence at Fol. 1476 2382
- Dfts. Ex. P-127—Photostat of stock certificate for 600 shares of stock of Houde issued to H. L. and G. H. Chisholm, dated Oct. 22, 1928. Received in evidence at Fol. 3992 (and see stipulation at 1307) 2758
- Dfts. Ex. P-128—Photostat of certificate for 2438 $\frac{3}{4}$ shares of stock of Houde Company issued to defendant Cooley, dated Oct. 25, 1928. Received in evidence at Fol. 1305 (and see stipulation at 5443) 2759
- Dfts. Ex. P-129—Receipt executed by B. D. Shultz, dated Oct. 24, 1928. Received in evidence at Fol. 1296 2759

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Dfts. Ex. P-139—Receipt executed by A. B. Shultz, dated Oct. 24, 1928. (Said receipt as certified to this court in 1935 as "Respondent Exhibit 4" in the record in <i>Chisholm v. Commissioner</i> , [79 F. (2d) 14] and which contained no notation by Fisk was received in evidence in these suits at Fol. 6792.) Received in evidence at Fol. 3389, 4636 (and see stipulation at 1307 and statement at 6792)	2761
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Dfts. Ex. P-141—Letter of defendant Wurst to A. B. Shultz, dated Dec. 6, 1928. Received in evidence at Fol. 3518.....	2765
Dfts. Ex. P-150—Liability ledger sheet of defendant Bank covering loans to defendant Cooley. Received in evidence at Fol. 3405.....	2768
Dfts. Ex. P-151—Certified check register of defendant Bank. Received in evidence at Fol. 3410	2769
Pl. Ex. P-152 (Id.)—Sheet from Discount Book of defendant Bank, dated Oct. 24, 1928. See stipulation at 3407).....	
Pl. Ex. P-153A/J—Collateral cards of defendant Bank relating to loans to defendant Cooley. Received in evidence at Fol. 1630.....	2383
Pl. Ex. P-155a—Ledger sheet of defendant Bank covering defendant Cooley's deposit account therein. Received in evidence at Fols. 1702-3, 2971	2393a

Pl. Ex. P-155b—Continuation of Plaintiffs' Ex. P-155a. Received in evidence at Fols. 1702-3, 2971	2393c
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Pl. Ex. P-158a through P-165c (Id.)—Various checks of defendant Cooley, certain of which (P-158c, P-162, P-163, P-164a, P-164b) were received in evidence at Fols. 1029, 1030, 1228, 1231, (and see stipulation at 3410-11).....	2772
Pl. Ex. P-166 (Id.)—Checks of Syndicate Managers, certain of which were received in evidence as Defendants' Exhibits D-47, D-48 and D-50 at Fols. 3074 and 3516. (See stipulation at 1721)	2773
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Dfts. Ex. P-167b—Further page from report of weekly transactions to Executive Committee of defendant Bank, dated Oct. 25, 1928. Received in evidence at Fol. 930.....	2777
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Pl. Ex. P-170—Assignment executed by defendant Cooley, dated Nov. 16, 1928. Received in evidence at Fol. 5662	2394

Dfts. Ex. P-171—Letter H. L. and G. H. Chisholm to Krauss & Company and New York Car Wheel Company, dated Oct. 22, 1928. Received in evidence at Fol. 3991	2780
Dfts. Ex. P-172—Assignment executed by H. L. Chisholm to H. L. & G. H. Chisholm. Received in evidence at Fol. 3988	2781
Dfts. Ex. P-173—Assignment executed by G. H. Chisholm to H. L. & G. H. Chisholm. Received in evidence at Fol. 3988	2782
Dfts. Ex. P-174—Excerpt from partnership agreement of H. L. and G. H. Chisholm, dated Oct. 20, 1928. Received in evidence at Fols. 3988-9..	2784
Dfts. Ex. P-175a—Letter Joseph H. Morey to Syndicate Managers, dated Nov. 26, 1928, transmitting Plaintiffs' Ex. P-170. Received in evidence at Fol. 5732	2785
Dfts. Ex. P-175b—Carbon of letter defendant Wurst to Joseph H. Morey, dated Nov. 26, 1928, acknowledging receipt of Defendant's Ex. P-175a. Received in evidence at Fol. 5732..	2786
Dfts. Ex. P-176—Declaration of Trust executed by defendant Wurst, dated Nov. 15, 1928. Received in evidence at Fol. 6073.....	2787
Dfts. Ex. P-178—Executed counterpart of Syndicate agreement, dated Nov. 1, 1928. Other executed counterparts were received in evidence as Defendants' Exs. P-179, D-4 and D-8. Received in evidence at Fol. 1482.....	2789
Dfts. Ex. P-179—Executed counterpart of Syndicate agreement, dated Nov. 1, 1928. See Defendants' Ex. P-178, <i>supra</i> . Received in evidence at Fol. 1482	2789
Pl. Ex. P-181—See note <i>re</i> Plaintiff's Ex. 338 for Id. and Exhibit B to Complaints in these suits.	
Dfts. Ex. P-182—Executed carbon of letter Syndicate Managers to Continental National Bank & Trust Company, dated Nov. 20, 1928. (Plaintiff's Ex. P-87 is a photostat of this exhibit).	

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Received in evidence at Fol. 3505 (and see stipulation at 3519)	2790
Dfts. Ex. P-183—Telegram Continental National Bank & Trust Co. to defendant Bank, dated Dec. 3, 1928, together with translation thereof. Received in evidence at Fol. 3509.....	2794
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Dfts. Ex. P-185—Telegram defendant Bank to Continental National Bank & Trust Co., dated Dec. 3, 1928, together with translation thereof. Received in evidence at Fol. 3509.....	2794
Dfts. Ex. P-186—Draft drawn by defendant Bank on First National Bank of Chicago for \$15,000, payable to Eastman, Dillon & Co., dated Nov. 20, 1928. Received in evidence at Fol. 3077....	2795
Dfts. Ex. P-187—Draft drawn by defendant Bank on First National Bank of Chicago, dated Nov. 20, 1928, for \$15,000 payable to Central Trust Co. of Illinois. Received in evidence at Fol. 3077	2795
Dfts. Ex. P-188—Check register of defendant Bank showing record of drafts drawn on First National Bank of Chicago. Received in evidence at Fol. 3077	2795
Dfts. Ex. P-189—Ledger page of defendant Bank showing its account with First National Bank of Chicago. Received in evidence at Fol. 3077-8	2795
Pl. Ex. P-192—Syndicate account in handwriting of the defendant Wurst on yellow sheets of paper, together with sheets annexed thereto. Received in evidence at Fol. 852	2396
Pl. Ex. P-193 (Id.)—Carbons of letters addressed by Syndicate Managers to Syndicate participants, dated Nov. 14, 1928. The copies addressed to A. B. Shultz and the defendant Sawyer were received in evidence as Plaintiffs' Ex. P-535, and Defendants' Ex. 193a, respectively. (See statement at 3490-3)	2402
Dfts. Ex. P-193a—Carbon of letter Syndicate Managers to A. B. Shultz, dated Nov. 14, 1928.	

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See Plaintiffs' Ex. 193 for identification, <i>supra</i> . Received in evidence at Fol. 3491	2796
Pl. Ex. P-194 (Id.)—Carbons of letters Syndicate Managers to Syndicate participants, dated Dec. 5, 1928. The copy addressed to C. R. Wyckoff was received in evidence as Plaintiffs' Ex. P-517. The copy of the letter addressed to A. B. Shultz was received in evidence as De- fendants' Ex. D-41. (See stipulation at 1475 and statement at 3511-2)	2402
Dfts. Ex. P-195—Original letter Laverack & Haines to the defendant Cooley, dated Nov. 27, 1928, together with report annexed thereto. Re- ceived in evidence at Fol. 5468	2798
Dfts. Ex. P-200—Photostats of seven original let- ters written by A. B. Shultz to Barnes, Hou- daille-Hershey Corporation and Fred A. Cor- nell, between Jan. 14, 1929 and Aug. 30, 1929. Received in evidence at Fols. 5351-2 (and see stipulation at 1307)	2799
Pl. Ex. P-224—Securities Transit ledger sheet of the defendant Bank covering various dates from May 24, 1928 to March 5, 1929. Received in evidence at Fol. 3073	2403
Pl. Ex. P-225—Original letter E. T. Lodge, Trico Products Corporation, to the defendant Wurst, dated Nov. 14, 1934, with memorandum of charges on long distance telephone calls annex- ed thereto. Received in evidence at Fol. 3082..	2404
Pl. Ex. P-226 (Id.)—Carbon of unexecuted agree- ment between stockholders of Houde Company and the defendant Bank, dated Feb. , 1928. This is the same as Plaintiffs' Ex. P-294 (an- other carbon from lawyer's files) in evidence and Plaintiffs' Ex. P-456 for identification, the latter being original from files of Eastman, Dil- lon & Co. (See stipulation at 2393)	2406
Pl. Ex. P-227—Carbon of draft of proposed finan- shares of stock of Houdaille Corporation, to- gether with pencil notations thereon. Received in evidence at Fol. 2470	2407
cial circular relating to issuance of 70,000	

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- Pl. Ex. P-228 (Id.)—Draft financial circular covering proposed issuance of 70,000 shares of convertible Class A stock of Houde containing the typewritten signature of Eastman, Dillon & Co. 2410
- Pl. Ex. P-229 (Id.)—This exhibit is the original of which Plaintiffs' Ex. P-339 is a copy, so far as the latter exhibit contains typewritten matter. Upon the depositions four sheets of yellow paper clipped to Plaintiffs' Exhibit P-229 were marked Plaintiffs' Exs. P-229A, P-229B, P-229C and P-229D, respectively, (See 4489-90) 2412a
- Pl. Ex. P-234—Statistical table relating to issuance of 50,000 shares of stock at 20 and 45,000 shares of stock at 21, (Plaintiff's Ex. P-417b from the files of Eastman, Dillon & Co. is a carbon copy of P-234). Received in evidence at Fol. 3082 (and see stipulation at 6319-20).. 2413
- Dfts. Ex. P-240—Memorandum in handwriting of Rea. Received in evidence at Fol. 4232 ... 2800
- Dfts. Ex. 241—Memorandum in handwriting of Rea. Received in evidence at Fol. 4232 2801
- Dfts. Ex. P-248—Copy of longhand Western Union telegram Oishei to E. F. Johnson, General Motors Corporation, dated October 17, 1928. Received in evidence at Fol. 5057 2802
- Dfts. Ex. P-249a/b—Oishei's notes. Received in evidence at Fol. 5038-9 2803
- Dfts. Ex. P-250a/c—Oishei's notes. Received in evidence at Fol. 5038-9 2804
- Dfts. Ex. P-254—Telegram Carlton M. Higbie to Oishei, dated Nov. 12, 1928. Received in evidence at Fol. 5063 2805
- Defts. Ex. P-255—Telegram Oishei to Carlton M. Higbie dated November 12, 1928. Received in evidence at Fol. 5063 2806
- Dfts. Ex. P. 257—Letter Harry Brown of Keane, Higbie & Co. to Oishei, dated November 14, 1928. Received in evidence at Fol. 5064 2807

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Dfts. Ex. P-258—Carbon of letter Oishei to Harry E. Brown dated November 16, 1928. Received in evidence at Fol. 5064	2809
Pl. Ex. P-259—Telegram C. H. Oishei to J. R. Oishei, dated November 23, 1928. Received in evidence at Fol. 5072-3	2414
Dfts. Ex. P-262—Photostat of ledger sheet of defendant Bank's Safekeeping Account for A. B. Shultz relating to Class A stock of Houdaille-Hershey Corporation. Received in evidence at Fol. 4781	2810
Dfts. Ex. P-263—Photostat of defendant Bank's Safekeeping Account for A. B. Shultz, relating to Class B stock of Houdaille-Hershey Corporation. Received in evidence at Fol. 4781	2812
Dfts. Ex. P-266—Statement prepared by N. H. Drosendahl of Trust Department of defendant Bank giving a recapitulation of the Bank's Safekeeping Account for A. B. Shultz in stock of Houdaille-Hershey Corporation. Received in evidence at Fol. 4782	2814
Dfts. Ex. P-267—Signature card of defendant Bank for deposit account of Syndicate Managers. Received in evidence at Fol. 3523	2817
Dfts. Ex. P-268b—Nine sheets comprising original deposit account of A. B. Shultz in the defendant Bank from Nov. 19, 1928 to July 1, 1932. Only the first sheet marked "1A" on the front and "B" on the reverse side and covering dates Nov. 19, 1928 to Feb. 21, 1929 was offered and received. Received in evidence at Fol. 3517	2818
Pl. Ex. P-269a/h (Id.)—Daily statements of the defendant Bank covering various dates in October and November, 1928. These exhibits are erroneously referred to in the record as Plaintiffs' Exs. P-169a/h. (See statement at 662-6)	2415
Pl. Ex. P-270—Proposed financial circular covering issuance of 100,000 shares Houde Engineering Corp. Class A Participating stock, dated March 24, 1928. (Received in evidence at Fol. 4100	2416

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Pl. Ex. P-271—Memorandum headed "HOUDE ENGINEERING CORPORATION PROPOSED STOCK PROVISIONS", bearing typewritten name of H. R. Bennett, dated March 26, 1928. Received in evidence at Fol. 4100	2419
Dfts. Ex. P-272—Slip of printed paper headed "Preferred Stock Provisions." Received in evidence at Fol. 4143	2819
Dfts. Ex. P-273—Slip of printed paper headed "Common Stock Purchase Warrants." Received in evidence at Fol. 4143	2819
Dfts. Ex. P-274—Slip of printed paper headed "Common stock (no par value)." Received in evidence at Fol. 4143	2819
Dfts. Ex. P-275—Paper in handwriting of defendant G. H. Chisholm bearing notation "DAVE." Received in evidence at Fol. 4129	2820
Dfts. Ex. P-276—Paper in handwriting of defendant G. H. Chisholm bearing notation "BERT." Received in evidence at Fol. 4129 ..	2821
Dfts. Ex. P-277—Paper in handwriting of defendant G. H. Chisholm bearing notation "GHC." (Receive in evidence at Fol. 4129 ..	2822
Pl. Ex. P-278—Paper in handwriting of defendant G. H. Chisholm. Received in evidence at Fol. 4105	2420
Pl. Ex. P-279—Paper in handwriting of defendant G. H. Chisholm. Received in evidence at Fol. 4105	2420a
Pl. Ex. P-280a/c—Carbon of Chisholm's memorandum giving data on Houde. Received in evidence at Fols. 4086-7	2421
Pl. Ex. P-282—Paper in the handwriting of A. B. Shultz. Received in evidence at Fol. 4115 (and see stipulation at 1309)	2424
Pl. Ex. P-283*—Carbon of letter Sawyer to Isham, Lincoln & Beale, dated Feb. 13, 1928. Received in evidence at Fol. 2388	2425

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Pl. Ex. P-284—Carbon of letter Sawyer to Beaumont, Smith & Harris, dated Feb. 13, 1928. Received in evidence at Fol. 2388 2426

Pl. Ex. P-285—Carbon of letter Sawyer to Robert H. Richards, dated Feb. 14, 1928. Received in evidence at Fol. 2388 2427

Pl. Ex. P-286—Letter from Charles Wright, Jr., of Beaumont, Smith & Harris, to Sawyer, dated Feb. 14, 1928. Received in evidence at Fol. 2475 2428

Pl. Ex. P-288—Letter Robert H. Richards to Sawyer, dated Feb. 23, 1928, Received in evidence at Fol. 2475-6 2429

Pl. Ex. P-289—Carbon of letter Sawyer to Robert H. Richards, dated Feb. 24, 1928. Received in evidence at Fol. 2476 2430

* Exhibits bearing numbers from P-283 to P-351, inclusive, were produced from the files of the defendant Sawyer.

Pl. Ex. P-290a—Letter Sawyer to Charles Wright, Jr. of Beaumont, Smith & Harris, dated February . . . , 1928 (not sent). Received in evidence at Fols. 2388-9 2431

Pl. Ex. P-291 (id.)—Letter Parker to Sawyer, dated March 2, 1928 2433

Pl. Ex. P-292—Carbon of letter Sawyer to Rea, dated July 14, 1928. Received in evidence at Fol. 2488 2434

Pl. Ex. P-293—Carbon of letter prepared by Sawyer to be sent to Ford Motor Co., dated Feb. 3, 1928. (This is a carbon copy of the typewritten portion of Plaintiffs' Ex. P-453 from the files of defendants Eastman, Dillon & Co.) Received in evidence at Fol. 2494 2435

Pl. Ex. P-294—Carbon of proposed agreement between Houde stockholders and the defendant Bank, dated Feb. . . . , 1928. (This is the same as Plaintiffs' Ex. P-226 for iden. and Plaintiffs' Ex. P-456 for identification, the latter being the ribbon copy from the files of the defendant Eastman, Dillon & Co.) Received in evidence at Fols. 2393-4 2436

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Pl. Ex. P-295—Paper containing Sawyer's notes. Received in evidence at Fol. 2390	2445
Pl. Ex. P-298—Carbon of letter Sawyer to Corporation Trust Co. dated Oct. 22, 1928. Received in evidence at Fol. 2459	2446
Pl. Ex. P-299 (id.)—Telegram from Corporation Trust Company to Dudley, Stowe & Sawyer, dated Oct. 23, 1928	2446a
Pl. Ex. P-301 (id.)—Carbon of letter Sawyer to Joseph H. Morey, dated Oct. 25, 1928	2446a
Pl. Ex. P-303—Carbon of letter Sawyer to Corporation Trust Company, dated Oct. 31, 1928. Received in evidence at Fol. 2497	2447
Pl. Ex. P-312—Carbon of letter Sawyer to Corporation Trust Co., dated Nov. 9, 1928. Received in evidence at Fol. 2497	2448
Pl. Ex. P-314 (id.)—Unexecuted carbon of Defendants' Ex. P-182	2448a
Pl. Ex. P-315 (id.)—Carbon of Plaintiffs' Ex. P-88. P-315 is from files of the defendant Sawyer	2448a
Pl. Ex. P-327—Receipted bill of Dudley, Stowe & Sawyer to Fred B. Cooley, c/o the defendant Bank, dated Nov. 16, 1928. Received in evidence at Fol. 2590	2449
Pl. Ex. P-328a (id.)—Copy of Plaintiffs' Ex. P-98 from files of defendant sawyer. (See stipulation from files of the defendant Sawyer.....	2449a
Pl. Ex. P-329 (id.)—Copy of Plaintiffs' Ex. P-101 ..from files of the defendant Sawyer	2449a
Pl. Ex. P-330—Paper containing longhand notes of defendant Sawyer, headed "F. P. Scully". Received in evidence at Fol. 2401	2450
Dfts. Ex. P-332a—Affidavit executed by A. B. Shultz, Oct. 22, 1928. Received in evidence at Fol. 2538 (and see stipulation at 1307)	2823

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Dfts. Ex. P-333—Ribbon copy of unexecuted affidavit of the defendant Sawyer dated Nov. , 1928. Received in evidence at Fol. 2536	2827
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OCT 3 1942

CHARLES ELMORE BROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1942.

No. 404.

WYATT D. SHULTZ and CAROLYN SHULTZ, as
Co-Executors under the Last Will of Albert B.
Shultz, Deceased,

Petitioners,

vs.

MANUFACTURERS & TRADERS TRUST COMPANY,
Individually and as Co-Executor under the Last Will
of Albert B. Shultz, Deceased, *et al.*,

Respondents.

BRIEF OF ALL RESPONDENTS EXCEPT EASTMAN,
DILLON & CO. IN OPPOSITION TO APPLICATION
FOR CERTIORARI.

HAROLD R. MEDINA,
LOUIS L. BABCOCK,
NOEL S. SYMONS,
MASON O. DAMON,
WILLIAM GILBERT,

Respondents' Counsel.



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Exhibits

The original exhibits in this case have been duly filed with the clerk of this court. In support of their application the plaintiffs have printed and are submitting certain of the exhibits. Accordingly the respondents are printing and submitting herewith under separate cover certain additional exhibits which are referred to in their briefs.

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 404.

WYATT D. SHULTZ and CAROLYN SHULTZ, as
Co-Executors under the Last Will of ALBERT B.
SHULTZ, Deceased,

Petitioners,

against

MANUFACTURERS & TRADERS TRUST COM-
PANY, Individually and as Co-Executor under the
Last Will of ALBERT B. SHULTZ, Deceased,
PERRY E. WURST, LEWIS G. HARRIMAN, FRED-
ERICK B. COOLEY, GEORGE H. CHISHOLM,
HARRY L. CHISHOLM, RALPH HOCHSTETTER,
ANSLEY W. SAWYER;

and

THOMAS C. EASTMAN, HERBERT L. DILLON,
HENRY L. BOGART, JR., GILMER SILER, In-
dividually as well as Co-Partners with JAMES P.
MAGILL and MAURICE H. BENT, doing business
under the firm name and style of Eastman, Dillon
& Company,

Respondents.

Consolidated
Causes.

WYATT D. SHULTZ and CAROLYN SHULTZ, as
Co-Executors under the Last Will of ALBERT B.
SHULTZ, Deceased,

Petitioners,

against

MANUFACTURERS & TRADERS TRUST COM-
PANY, as Co-Executor under the Last Will of
ALBERT B. SHULTZ, Deceased, THOMAS CANT-
WELL and GEORGE P. REA,

Respondents.

BRIEF OF ALL RESPONDENTS EXCEPT EASTMAN, DILLON & CO. IN OPPOSITION TO APPLICATION FOR CERTIORARI.

Statement.

Plaintiffs apply for certiorari to review a judgment of the United States Circuit Court of Appeals for the Second Circuit which unanimously affirmed a judgment of dismissal rendered after the trial before Burke, J., without

a jury, in the District Court for the Western District of New York of consolidated actions for the restitution of alleged secret profits flowing from asserted fraud in the acquisition and execution of an alleged agency, and for damages. The opinion of the Trial Court will be found at pages 177-202 of the record and is reported in 40 F. Supp. 675-687; the Findings of Fact and Conclusions of Law appear at pages 202-245 of the record; the opinions of the Circuit Court of Appeals appear at pages 2323-2347 and are reported in 128 Fed. (2d) 889.

Nature of Action.

Plaintiffs are two of the executors of Albert B. Shultz, president and former principal stockholder of Houde Engineering Corporation (Houde). The principal defendant is the third executor, Manufacturers & Traders Trust Company (the Bank), against whom, together with some thirty-four other individuals and firms named as defendants, a recovery in excess of \$10,000,000 was sought. Plaintiffs charged that at a time when the Bank was acting as commercial banker for Houde and was intimately acquainted with its financial circumstances, it entered into a conspiracy with other defendants herein to acquire control of that company and by sundry unlawful frauds and devices to cheat and defraud decedent and the other Houde stockholders into parting with their stock. It was said to have carried out this conspiracy by first inducing decedent and his co-stockholders to employ it as their agent; having acquired this agency it was claimed that the Bank proceeded to purchase the stock through a dummy, thereafter disposing of it at a large profit to itself and to its co-defendants. Plaintiffs sought recovery of this profit.

Defendants denied the agency, denied the alleged breach of agency, and asserted the statute of limitations. On all these issues defendants were sustained by the Trial Court.

The Petition.

Ignoring the Trial Court's findings and basing their argument on what the majority of the Circuit Court of Appeals have characterized as "a highly involved series of inferences, all against the direct findings of the Court", plaintiffs, in a petition as misleading and inaccurate as it is intemperate, launch an wholly unwarranted attack upon these defendants.

Taking an isolated phrase here, an unrelated expression there, selecting at random bits of testimony they consider favorable to their contention and completely ignoring the rest, plaintiffs attempt to piece together a story of fraud and misconduct which they present to this Court as based upon what they term the "undisputed facts". This is all with the avowed purpose of inviting review of this case on its merits, notwithstanding the fact that what is tendered by the petition is the very narrow question of the statute of limitations.

We are mindful of this Court's admonition that it will not grant certiorari "merely to review evidence or inferences drawn from it." (*General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, *U. S. v. Johnston*, 268 U. S. 220). Yet the challenge laid down by the petition is one we cannot ignore.

While none of the Findings of Fact in defendants' favor was disturbed by the Circuit Court of Appeals, the nature of the petition seems to us to make it necessary that we demonstrate not only that the determination concerning the statute of limitations was clearly correct, but also that

the findings of the Trial Court on the merits were amply supported by the evidence. That Judge Clark was completely satisfied of this appears from his opinion, in which Judge Swan concurred. Even a casual scrutiny of the record will make it plain that the doubts on the merits expressed by Judge Frank involved pure issues of veracity and credibility, which it was the peculiar province of the Trial Judge to resolve (F. R. C. P. 52).

Were it not for the garbled presentation of the case in the petition we should be content with respect to the merits merely to refer to the opinion and findings below, supplemented by a succinct argument addressed to the question of law relative to the plea of limitations. The character of the petition, however, seems to us to make it necessary to go somewhat further and discuss the evidence sufficiently to demonstrate that the findings are amply supported. This we shall therefore do, making every effort to keep the discussion as brief as is consistent with the extremely lengthy record, and following the same with a consideration of the questions of law which the application purports to present.

Summary of Facts.

Since the facts are so fully stated in the opinion and findings of the Trial Court, and in the opinion of Judge Clark, we shall only summarize them briefly, making such comments as we deem appropriate.

The Houdaille shock absorber was invented by Maurice Houdaille of Paris. Prior to December, 1918, decedent acquired the American patent rights to this invention and shortly thereafter organized Houde.

Long prior to the specific transactions involved in this case decedent and his associates in Houde had been trying to sell the company. These efforts go back as far as 1925, long before the Bank had any contact with Houde or its

affairs, and were due to a number of factors, among them being the highly competitive nature of the industry (P-105 a,¹ P-227, P-280a/c, P-468a; R. 723, 740), the company's record of steadily declining earnings (P-21, P-22), its unfavorable patent situation (P-19, P-27, P-109, P-280a/c; R. 1310, 1364, 1730-2) and its chronic lack of adequate working capital (R. 451, 500, 615, 730, 1085, 1095, 1209, 1306, 1341). The company had been offered to a number of companies and individuals, as, for instance, to Stewart Warner for \$2,400,000 and to Chrysler for \$3,000,000. They all declined to buy (P-27, P-29, P-30, P-31, P-33; R. 730-1, 1002, 1043, 1085-6, 1224, 1306, 1308, 1310).

In the early part of 1928 the company entered into a contract with the Ford Motor Company to supply it with shock absorbers on its new Model A car (P-24a/b), and as a result faced the problem of finding capital for plant expansion and equipment (P-114; R. 1308, 1722-9). It asked Rea, an officer of the Bank, to undertake a survey of its affairs for this purpose (R-557, 922, 1090-1, 1095-6, 1226-7). Such a survey was undertaken with the assistance of Central Trust of Chicago (a defendant here) and Eastman Dillon & Co. (another defendant here) and on its completion a proposal of refinancing was formulated (P-294; R. 927), but this proposal was not acceptable to the stockholders (R. 1384-5). As matters finally eventuated the Bank itself agreed to extend to the company whatever accommodation it needed to meet its working capital requirements, and appropriate loans for this purpose were thereupon granted (R. 733, 955, 1094).

In the period preceding the survey Eastman Dillon had been informed of the stockholders' desire to dispose of their holdings and on July 23rd wrote Rea stating that they had

¹ Exhibits are referred to as "P-1", "D-1", etc. Typographical emphasis throughout brief is ours.

discussed the matter with Timken-Detroit Axle Company of Detroit and that that company had displayed "a very definite interest in Houde" (P-54). They asked Rea to obtain an "option" on the stock (R. 1475, 2059-60). Rea's first discussions on the subject were with decedent, but the latter soon thereafter departed on a business trip to Europe, leaving the matter of negotiating a sale in the hands of Chisholm, vice-president and substantial stockholder of Houde and decedent's financial adviser (R. 330, 395, 712).

On September 26th, following discussions among Rea, Chisholm and certain of the other stockholders, there was executed the instrument underlying this litigation. This instrument (P-98), prepared in its final form by Irving L. Fisk, Houde's attorney and attorney for decedent in this transaction, provided as follows:

"IN CONSIDERATION of \$1.00 receipt of which is hereby acknowledged, we the undersigned stockholders of the Houde Engineering Corporation, hereby give to Krauss & Company,² for a period thirty days from the date hereof, the right to purchase all the stock of the Houde Engineering Corporation at a price of (\$4,000,000) Four Million Dollars in total. This option can only be exercised by the payment of cash before its expiration.

It is understood that the net assets of the Houde Engineering Corporation, when, as, and if this **option shall be exercised** will be at least equivalent to the position as set forth in its balance sheet dated August 31st, 1928, and any accrual in these net assets occurring since the close of business August 31st, 1928 shall adhere to the **vendors in this option.**

² i. e. the Bank's nominee.

Inasmuch as Krauss and Company will act as a broker in this transaction, it is also understood that in the event of **the** sale of said stock being consummated Krauss and Company will be entitled to a commission from the purchase price of 3%.

If stockholders owning not more than a total of 265 shares of said stock, who do not sign this **option**, refuse to join in **the** sale at the price aforesaid, there shall be a reduction made in the purchase price of \$1,640.19 per share for each share of said stock which the undersigned shall be unable to deliver to the purchasers.

It is understood that the name of A. B. Shultz is signed hereto in pursuance of verbal authority given by him to negotiate a sale of said stock.

A. B. SHULTZ, by G. H. Chisholm
 GEORGE H. CHISHOLM, *V. Pres.*
 HARRY L. CHISHOLM, *Treas.*
 B. D. SHULTZ, *Secretary.*
 J. N. SCULLY, *V. P. Director.*"

It is this option which the Bank subsequently and on October 11th accepted in the following terms, to wit:

"Referring to the **option** dated September 26, 1928, which you have given us for the purchase of all of the stock of Houde Engineering Corporation, at a price of \$4,000,000.00, we beg to advise you that we have secured as a purchaser the New York Car Wheel Company, of this city, which has agreed to purchase said stock upon the terms of our option, and has made available in our hands the sum of \$4,000,000.00 therefor.

We accordingly notify you that we elect to exercise our option as of this date, and tender you payment in

full upon delivery to us of all the stock of the Houde Engineering Corporation, duly endorsed for transfer, less a possible maximum of 265 shares, all as provided in our option. We shall be glad to suit your convenience as to time and place of delivery, and payment prior to October 25th, and suggest that you promptly arrange with us for an early closing.”,

a copy of this acceptance being sent to decedent by registered mail and being received by him upon his return from Europe (R. 433).

On the trial plaintiffs claimed and sought to prove that before the option was signed, an understanding had been reached with the officials of the Bank that the Bank was to have no interest in the purchase and that the price mentioned therein was to be regarded as “minimum”. This claim was not sustained in any particular and was shown to be wholly without substance.

Rea testified that the only discussion at the meeting preceding the execution of the instrument of September 26th had to do with the granting of an option *to the Bank* (R. 1395). He stated that he informed the stockholders present “that it was essential that an option be given at a definite price” (R. 1389) and that they *all* expressed a willingness “to give an option” at the price of \$4,000,000, plus the accrued earnings (R. 1390). He said the stockholders themselves fixed the price at which they were willing to sell (R. 1443, 1451). He denied that there was any talk of agency (R. 1395).

Chisholm, decedent’s representative in the transaction, understood that what Rea wanted was an “option to *buy* the Houde stock” (R. 735). He testified that he thought the price of \$4,000,000 fair to both the stockholders and the purchaser (R. 1313). He said he didn’t care in the least

who bought the stock, whether "the Bank * * * or John Jones or General Motors" (R. 1001; and see R. 736, 1334). He stated that it was his understanding that the Bank was to receive the commission provided for "even if they bought it themselves" (R. 737).

Fisk, decedent's attorney, testifying concerning his conversations with his clients on the evening preceding the execution of the option, stated that the only price then mentioned to him was that contained "in the paper that they showed me, as the price for all of the stock" (R. 1522). In this connection he stated (R. 1523-4):

"Q. During that evening was any mention made by anyone of a minimum price? A. No. * * *

Q. Was anything said by either of these gentlemen who were there about the Bank not having any interest in the sale? A. No."

Significantly enough, Fisk's contemporaneous office charge slip covering his legal services on the evening of September 25th referred to such services as "revision of option" (P-494b).

And, lastly, Dave Shultz, decedent's brother and fellow stockholder, when questioned regarding his understanding of what the instrument of September 26th meant to him when he signed it, testified that it never entered his head that the Bank was "to act as agent" and that all he was interested in was getting his money (R. 429).

The foregoing should effectively put at rest any question as to the intention underlying the instrument of September 26th and what it was intended to accomplish. Were there any doubt on the subject, however, it is effectively dispelled by the language of the Bank's formal acceptance of October 11th (P-101), already considered. This letter, it will be recalled, expressly referred to "*the option* * * *

*which you have given us for the purchase of all the stock * * **. This letter informed decedent that "*we (the Bank) elect to exercise our option, as of this date, and tender you payment in full * * **all as provided in *our option*". This letter shows that the Bank (and nobody else) was pledging its responsibility to the Houde stockholders. It shows that the Bank (and nobody else) was making tender of payment. It shows how the *Bank* regarded the transaction and that it believed that it was accepting the option *according to its terms*. It is to be borne in mind that the transaction was later actually consummated *on the basis of this acceptance*, the accrued earnings provided for in **the option**, amounting to \$210,611.02 (P-117), being computed to October 11th, the date of the letter of acceptance, rather than to October 24th, the date on which the sale was closed.

Subsequent to the execution of the option Chisholm sent certain cablegrams to decedent in Europe. The language of one of these (P-105a) is relied upon by plaintiffs as spelling out a contract of agency between decedent and the Bank, it being claimed (Pet. p. 10) that this cablegram was "prepared (by Chisholm) after a discussion with Rea to formulate its contents." We do not deem it necessary to discuss this cablegram, the language of which was fully explained by Chisholm (R. 739-40), for the undisputed evidence shows, and the Trial Court found, that none of the defendants, except Chisholm himself, had anything whatever to do with its preparation and in fact had no knowledge or notice of its contents (R. 364, 408, 441, 609-11, 737-8, 743, 1321, 1324, 1381, 1394-5, 1397, 1447, 1449; Finding 52, R. 213).

Immediately after the execution of the option efforts were made to sell to the various companies with whom Buffington had been negotiating (P-391, P-392, P-393, P-

395, P-397, P-403; R. 1240, 1392). For various reasons all of these companies declined to buy (P-403). Rea also tried to interest Oishei, director of the Bank and president of Trico Products Company, but the latter, after having the Houde patents examined by a Buffalo patent attorney (P-109), informed Rea that he was not interested (R. 702, 1099-1100, 1102, 1690-2).

It was following this that the sale to Cooley was consummated. Cooley, president and controlling stockholder of New York Car Wheel Company, when approached by the Bank, was at first reluctant to buy because of the size of the undertaking, but finally agreed to do so when the officers of the Bank agreed to take the commitment off his hands in the event of his death or disability, and agreed to help him form a syndicate to take over a portion of the purchase if he determined upon this course as the best means of handling his commitment (R. 1102-3, 1401, 1799-1800, 1840). Upon these terms he committed himself to make the purchase and thereafter executed the purchase memorandum of October 11th, 1928 (P-112) embodying the terms of his understanding with the officers of the Bank. It was following the execution of this memorandum that the Bank sent its formal acceptance of its option to the stockholders.

We pause for a moment to consider the memorandum of October 11th (P-112), for this instrument is stated (Pet., pp. 3, 15) to underlie plaintiffs' claim of breach of agency in this case. Commenting on the provisions having to do with the formation of a syndicate to take over \$3,500,000 of the purchase, plaintiffs point to this instrument as evidence that the real buyer of the stock was not Cooley but the Bank.

This view not only misreads the provisions of the instrument itself, but utterly ignores the *undisputed* testimony concerning it.

The instrument recites an agreement on the part of the

Bank's officers personally to assume the commitment in the event of the death or disability of Cooley. The only provision concerning the formation of a syndicate is the statement of *Cooley's* intention to form such a syndicate with the assistance of the officers of the Bank. There is absolutely no provision by which Cooley yields any part of his purchase to the Bank or gives either the Bank or its officers any interest whatever in the stock.

Upon the present trial all those who had been parties to this document testified as to the intention underlying it. They testified that so far as the instrument referred to a syndicate, it was a syndicate to be formed *solely* at Cooley's election and not otherwise (R. 510, 1112, 1252, 1401, 1800). This was in conformity with the testimony given concerning this instrument in the prior lawsuits involving these transactions. In the *Chisholm* tax case, long before any of these suits were instituted, Wurst testified that the underwriting group referred to in the memorandum of October 11th was to be formed only if Cooley "wanted to" (R. 460; and see R. 457). In the *Goetz* case in 1935 Rea also testified regarding this instrument and stated that "There was no obligation to form a syndicate" and that it was to be formed only "if Mr. Cooley desired it" (R. 510).

Under the memorandum of October 11th neither the Bank nor its officers acquired any interest whatever in Cooley's purchase. This memorandum was just what the witnesses said it was, an inducement to Cooley to purchase consisting of promises of assistance by the Bank's officers if Cooley wanted such assistance. It did not contain a single promise as to the disposition of his purchase running from Cooley to the others, except in the event of Cooley's death or disability. *All the covenants ran the other way, from the officers of the Bank to Cooley.* The instrument

gave Cooley the right to call on the officers for assistance if he wanted it; it gave *them* no right to compel *him* to do anything. Cooley so understood it (R. 1840); so did the others (R. 1112, 1252, 1401, 1924-5).

The assurances given by the Bank's officers in the memorandum of October 11th were personal, and were extended in order to bring about a sale of the stock where prior efforts to that end had failed. Without these assurances a sale could not have been consummated.

After buying the stock Cooley immediately undertook, through the offices of Oishei, to interest General Motors. Certain representatives of that company came to Buffalo on October 12th, but after looking into the matter informed Cooley that they thought he had paid too much and that they could see no value in excess of \$3,500,000 (Findings 78-80; R. 218-9, 776, 1004, 1116-7, 1255, 1806-8). The charge that *prior* to the sale to Cooley, General Motors had made an offer in excess of the option price, emanating from certain testimony given by Wurst in the *Chisholm* tax case (R. 460),^{2a} was conclusively exploded on the trial. It was Cooley who tried to interest General Motors, and the date of the conference with their representatives was definitely fixed by a mass of documentary evidence including the Guest Register of The Buffalo Club as being on October 12th, *after* Cooley agreed to buy (D-49, P-225, P-249a to P-250c, P-372, P-374).

^{2a} This testimony constitutes one of the so-called "admissions" upon which the present petition is predicated. Wurst's testimony in the *Chisholm* tax case was patently erroneous, as shown by his testimony on the present trial (R. 1930-2). Based on all the evidence the Trial Court made an express finding rejecting plaintiffs' claims in regard to this matter (Finding 79; R. 218). The subject had been previously explored in the action of the other stockholders. In that case the claim with regard to an alleged General Motors offer was shown to be so thoroughly without substance that it was withdrawn in its entirety before the close of the trial (Record on Appeal, 254 App. Div. 128; fols. 1649-50).

The result of the General Motors negotiations had made it quite evident that the prospects of a resale were not good, that Cooley probably would wish to call on the services of the Bank's officers, and that their heavy contingent liability in the event of his death or disability would continue for a substantial period of time. It was in the light of these facts that Cooley signed what has in this litigation been referred to as the declaration of October 13th (P-113). This is the document by which Cooley stated his intention to share with the officers of the Bank any profits he might realize from his commitment as a result of the following two contingencies, viz.: (1) If anything later developed from the General Motors negotiations, and (2) if he decided to form a syndicate and any profit resulted therefrom.

At the time this declaration was executed Cooley had already committed himself to the purchase. In this document he was merely speaking of what he "expected" to or "might" do if certain possibilities eventuated.

Upon the trial herein, plaintiffs sought to prove not only that this declaration was an "agreement", but that it was part and parcel of Cooley's *prior* agreement to purchase. As lending support to this claim it was suggested that this declaration must in fact have been executed on October 10th or 11th when Cooley made his agreement to purchase. There was not a scintilla of evidence adduced to substantiate this claim and it was summarily rejected by the Trial Court (Finding 88; R. 222), who had indisputable evidence of its falsity in a copy of the document annexed to an income tax examiner's report made long before there was any thought of litigation (R. 1981; and see R. 1008, 1118 *et seq.*, 1808 *et seq.*, 1933 *et seq.*). The undisputed testimony shows that the instrument was in fact prepared

and signed on the day it bears date (R. 606, 747, 759, 1008, 1118 *et seq.*, 1196, 1199, 1809, 1934 *et seq.*, 1980, 1981), and the Trial Court so found (Findings 88, 89; R. 222).

In the period following his purchase Cooley considered many different alternative plans including operation of the company, formation of a syndicate and a possible public financing (R. 787, 792, 816, 819, 850-3, 1122-3, 1409-10, 1816-17). During this period Cooley went to the plant and assumed the active management of the company (D-28; R. 384, 981, 1735, 1736 *et seq.*, 1774, 1819-20, 1823, 2208-9). He was introduced at the plant as the "new boss" (R. 1297).

Decedent returned from Europe on October 18th (R. 383), was disturbed when he heard of the negotiations with General Motors, Ford's principal competitor, but was entirely satisfied when informed that Cooley, not General Motors, had bought (R. 348-9, 377). Upon his return decedent learned of a claim that was being made against him by two of his co-stockholders (the Scullys), who were demanding more money for their stock by claiming that certain of the stock had originally been improperly issued to decedent (R. 800). So anxious was decedent to have the sale go through that he authorized Fisk, his attorney, to pay \$100,000 to settle this claim, and Fisk thereafter settled it with the Scullys for \$50,000 (P-119 a to 125, P-494c; R. 1938). Plaintiffs imply (Pet. p. 16) that decedent later delivered his stock under compulsion and under threat of some kind of litigation. We know of nothing to justify this assertion nor does it find the slightest support in the record.

The actual closing of the sale occurred on October 24th. On the closing decedent was represented by his attorney, Fisk (P-494a), who had previously revised and approved the option of September 26th on his behalf (P-494b). The stock was delivered and payment was made upon the basis of receipts which referred specifically to the instrument of

September 26th as an "option" (P-116b, P-129, P-130, P-135, P-137). Upon the consummation of the sale decedent signed two duplicate receipts (P-139, P-542). These differed from those signed by the other stockholders because they covered only part payment for decedent's stock, decedent and Cooley having previously agreed to defer the balance under an arrangement which yielded decedent interest on the unpaid amount (R. 1131-2; 1812-3). One of these receipts contained the undertaking of the Bank guaranteeing the payment of this balance (P-542). This, taken in conjunction with Wurst's testimony of his conversation with decedent at the time the receipt was delivered (R. 1948-91),³ shows beyond all doubt that decedent knew that the Bank was financing Cooley's purchase of his stock, and the Trial Court so found (Finding 31; R. 227). Decedent likewise knew that Cooley was a director of the bank (Finding 131; R. 227).

At the time Cooley agreed to buy, Harriman, on behalf of the Bank, agreed to loan the money to Cooley provided the latter put up adequate collateral for that purpose. The suggestion of \$600,000, plus the Houde stock, was entirely acceptable to Cooley, and the loan was made on this basis (R. 544, 550, 1104, 1926). The loan to Cooley was formally approved both by the Bank's Executive Committee and by the full Board of Directors (D-1, D-30). It was set forth in the statements of transactions submitted at these meetings,

³ Upon the trial the plaintiffs insisted upon a strict compliance with Section 347 of the New York Civil Practice Act (the so-called "dead man statute" excluding evidence of transactions with a decedent unless opened by the executors). This was the only occasion throughout the entire trial that any defendant was permitted to testify to any conversation with decedent, the Trial Court having ruled that in this instance the "door had been opened" by the plaintiffs. The naming of so many defendants in this case was obviously to seal their lips under this Section. For comment on the inequity which this statute works because of the extent to which it prevents a full disclosure of the facts, see *Dellefeld v. Blockdel Realty Co.*, 2 Cir., 128 F. (2d) 85.

together with the market value of the personal securities put up by Cooley which, aside from the Houde stock, aggregated \$637,909 (P-167a/b, P-168a/b). Upon all the evidence the Court found that the Bank's loan to Cooley was a *bona fide* one (Findings 121-125; R. 226). The Court also found that Cooley was a wealthy man, amply able to respond to his obligations (Finding 125; R. 226).

Included among the numerous financing plans considered by Cooley following his purchase were at least two that contemplated the sale of stock in a new company to decedent (P-240, P-241). One of the important provisions of the receipts signed by decedent in connection with the closing of October 24th was that decedent was to be "permitted to take stock of a new corporation in part payment of the balance" of the purchase price (P-139, P-542). Indeed, he had previously executed an affidavit (P-332a) for the purpose of qualifying in New York State a corporation which Cooley had caused to be organized in Delaware as one of his many plans for the handling of his committment. These various acts of decedent show not only decedent's knowledge and complete familiarity with Cooley's plans regarding his purchase, but also decedent's active participation in these plans.

On or about November 1st, following receipt of a letter from Eastman Dillon advising of the latter's unwillingness to undertake any public financing at that time (P-74), Cooley decided definitely to go ahead with his plan to form a syndicate and a syndicate or underwriting agreement to put this plan into effect was prepared. This syndicate differed substantially from that contemplated in the memorandum of October 11th (P-112). The latter was to relieve Cooley of a *portion* of the purchase price at his election. The syndicate actually formed took the *entire* commitment from Cooley at his (Cooley's) cost, leaving him with 25%

of any profit that might be realized. This 25%, under the terms of the underwriting agreement (P-335, P-336), was payable to Cooley or his "assigns."

At the time this syndicate was formed there was no prospect of a resale and no purchaser in sight (R. 994, 1060). On the contrary, as shown by the contemporaneous correspondence (P-75, P-86), it was Cooley's then intention to operate the company. The provisions of the syndicate agreement itself make this abundantly clear.

The opportunity to participate in the syndicate was extended to the Directors of the Bank at an informal meeting held on November 7th. Many joined; others, including Oishei, to whom the stock had previously been offered for sale, did not (R. 595, 1707). Plaintiffs complain of the fact (Pet., p. 20) that twenty-three of the twenty-seven individual allottees were officers or directors of the Bank. Harri-man testified that the reason the invitation to prospective purchasers was confined substantially to the directors of the Bank was because they were men capable of gauging the risk involved. If a large number of outsiders had been invited into the underwriting and it turned out badly, this might have offended good friends and customers of the Bank. If, on the other hand, it proved successful, this might easily have created a feeling that many additional people should have been invited who were not invited (R. 1161-2).

Among those who participated in the syndicate were decedent and the Chisholms, owners of approximately 70% of the Houde stock. Decedent subscribed \$250,000, and was allotted the full amount of his subscription (P-193a, D-4). They were not the only stockholders who knew of the syndicate. Dave Shultz knew of it and of the fact that his brother and the Chisholms had gone into it (R. 385-6). Jim Scully likewise knew about it; *he* tried to get a participation in it but was not allowed to when decedent objected because of their previous altercation (R. 345-8).

At the time decedent joined the syndicate he knew that the purchaser of the stock and the person from whom the syndicate was acquiring the commitment was a director of the Bank. He knew that such purchaser had been financed in his purchase by the Bank. He knew that when the syndicate took over the commitment from Cooley it was at *his* (Cooley's) cost. Moreover, as a member of the syndicate, he knew who his co-participants were and that the Bank and numerous of its officers and directors had taken shares in the underwriting. This was long before decedent was paid in full for his stock on the original sale and, therefore, long before the sale, as to him, was fully consummated. In short, if the Bank was an agent decedent knew that it and its officers were acquiring an interest in the subject matter of the agency. His participation in the syndicate *was with this knowledge*.

It was under circumstances not important here that the syndicate of which we speak quite unexpectedly some three weeks later found an opportunity to resell the stock to Harris Small at a price of \$6,000,000 (P-74, P-75, P-77, P-78, P-421, Ex. B to Cpts., P-182). Decedent's profit as a syndicate participant was \$76,942.39 (D-41). At the very time he received this payment he likewise received from the syndicate managers the unpaid balance due him upon the original sale (P-139, P-140, D-41, D-50).

Plaintiffs assert (Pet. p. 21) that the Chisholms were "secret" participants in the syndicate. This is not true. The Chisholms took a portion of one of two subscriptions made by their business associate, Wyckoff (R. 1330-1). This was not done until long after decedent's return from Europe. Far from being "secret", this participation was known even to decedent's brother, Dave Shultz, who was *not* a participant (R. 385-6). Plaintiffs also allude (Pet. pp. 24-5) to the alleged "secret" methods employed by

Cooley for the division of his syndicate profit, commenting on the fact that these payments were made by cashier's checks on a New York bank. As the testimony shows, these payments were made in this fashion for the sole purpose of avoiding gossip and bad feeling in the Bank, it being the uniform practice in that institution at that time to make all salary and bonus payments in cash to preserve the privacy to which officers and employees were alike entitled (R. 2005). These payments, moreover, were duly reported to the Executive Committee of the Bank's Board of Directors at a meeting held on December 12th, 1928 (R. 1175; and see Finding 202, R. 239). No more relevant to the issue, nor any more warranted in fact, are the grossly unfair, and but thinly veiled insinuations as to the so-called "tax avoidance" measures taken by certain of the defendants in connection with their profits from the syndicate (Pet. pp. 21, 22). Such measures as such defendants took to minimize their income tax liability were taken pursuant to law, and no suggestion has or can be made that these measures constituted any violation of law. It were perhaps as relevant to point out that when decedent returned from Europe he, too, consulted his attorney and tax expert in order to minimize his own tax liability on the sale of his stock to Cooley (P-494a, R. 1537-8); yet, how any of this bears upon the simple issues in this case is not apparent.

Since these defendants had no connection with the ensuing events, our reference to what occurred after the sale to Harris Small will be brief. The reason for the purchase by Harris Small was that that company and its associates were dealing in the stock of automotive companies with a view to their ultimate merger (R. 676). They had been singularly successful in financing of this character, having previously been instrumental in the acquisition and

financing of Oakes Products Corporation and Hershey Corporation respectively. After acquiring the Houde stock, they effected a merger of that company with other companies previously acquired, and these were ultimately consolidated into the present Houdaille-Hershey Corporation (D-72; R. 1627, 1787). The stock of the new company thereafter experienced a substantial rise on the Chicago Stock Exchange. Its fate following the market collapse of October, 1929 does not appear in the record, as defendants' offers of proof in this regard were excluded by the Trial Court.

Decedent, said the Trial Court, was "the only one who participated in all the Houde transactions" (R. 201). Although the sale to Harris Small ended the Houde transactions so far as the Bank and its officers and Cooley were concerned, decedent himself continued on in the new organization and became closely identified with the new purchasers. On December 11th he presided at a meeting of Houde's directors at which certain of the new purchasers and their representatives were elected directors (D-52). From Harris Small, one of the firms which participated in the public offering, he purchased a thousand units of the new stock (D-36, P-268b). In his further transactions in this stock he made an additional profit of \$25,737.50 (P-266). He continued as Houde's president and his salary was increased to \$25,000 a year (R-1629). He was elected a director and vice-president of the new corporation and as such attended numerous of its directors' meetings (R. 1627 *et seq.*). For several years he corresponded with Barnes, president of the new company, on the most friendly terms. (P-200, D-53, D-54, D-67, D-68, D-69, D-70, D-71). Never, by word or conduct, did decedent express the slightest dissatisfaction over the sale of his stock or breathe a word concerning the various alleged frauds which his per-

sonal representatives now maintain were practiced upon him. A year or two after he sold his stock he tried to interest the directors of the Bank in forming another syndicate to acquire the stock of a new venture in which he was interested (D-70, D-71; R. 1177, 1688-9).

The transactions underlying this controversy occurred in the latter part of 1928. The first of these consolidated actions was not instituted until September, 1938, almost ten years later.

The Issues Before the Trial Court.

Upon the evidence before it, the Trial Court had three main questions for determination:

1. Was there an agency?
2. If so, did defendants' conduct constitute a violation thereof?
3. Was the action instituted within the time limited by statute?

In disposing of the first two of these questions, the Trial Court made very complete and extensive findings of fact, including specific findings that the instrument of September 26th was an option, that the purchase of the stock by Cooley was a *bona fide* purchase, that no misrepresentations were made and that none of the defendants was guilty of any fraud or deceit, or was engaged in any conspiracy to defraud decedent. If these findings were supported by the evidence, they of course constitute a conclusive answer to this litigation (F. R. C. P. 52).

In considering the foregoing findings this Court will not, as we understand it, review the weight of the evidence, but "so far as there is any testimony consistent with the findings, it (the testimony) must be treated as unasailable" (*Adamson v. Gilliland*, 242 U. S. 350). Findings supported by "substantial" or "ample" evidence will not

be disturbed (*Borden's Farm Products Co. v. Ten Eyck*, 297 U. S. 251, *Mechanics Universal Joint Co. v. Culhane*, 299 U. S. 51). As stated in *U. S. v. United Shoe Machine Co. of N. J.*, 247 U. S. 32:

"The contentions could not well be more antagonistic, upon each of which there was conflicting testimony, and the important fact is to be borne in mind that it was given in open court * * *. The fact justifies deference to the findings of the trial court."

1.

Agency.

At page 5 of their petition, plaintiffs concede that if there never was any fiduciary relationship between decedent and the Bank, the basis for these suits is eliminated. In other words, if there was an option duly exercised, there is no need for further inquiry.

It was contended by defendants that the instrument of September 26th (P-98) and the Bank's acceptance of October 11th (P-101), together with the Bank's performance thereunder, constituted the acceptance of an option as a matter of law and excluded any question of agency. On the first appeal in the prior action of the minority stockholders the Appellate Division of the New York Supreme Court held that the instrument of September 26th was ambiguous and that it was error for the Trial Court to reject testimony which might resolve that ambiguity (249 App. Div. 88). Upon the trial below, Judge Burke, over the objection of defendants and following the decision of the Appellate Division, ruled that such testimony was proper and permitted plaintiffs' counsel to offer proof of all the surrounding and collateral facts which it was asserted bore upon the interpretation of the underlying instru-

ments. That was plaintiffs' insistent claim and it was adopted by the Trial Court. The case was tried upon that theory. Many hundreds of pages of testimony were devoted to this investigation. The construction of these written instruments, therefore, became a mixed question of law and fact. If a jury had been present, the question of the understanding and belief of the parties as to the nature and legal effect of the instruments and the facts surrounding their execution would have been submitted to it as a question of fact. The determination of the jury, if properly supported, would have been conclusive. Here the Court determined this question of fact, and the same rule of finality, of course, applies.

In the case of *First National Bank v. Dana*, 79 N. Y. 108, at page 116, the Court said:

"While it is the province of the court to construe contracts, yet where the meaning is obscure and depends upon facts *aliunde* in connection with the written language, very much must be left to the jury. (Phil. on Ev. [Cow. & H's. notes], 1420; *Gardner v. Clark*, 17 Barb., 551; *Etting v. Bank of U. S.*, 11 Wheat., 59; *Jennings v. Sherwood*, 8 Conn., 122.) Within this rule the case should have been submitted to the jury by the judge; and it was error to direct a verdict for the plaintiff."

In *Kenyon v. K. T. & M. M. A. Assn.*, 122 N. Y. 247, at page 254, an able judge states the rule as follows:

"The question, therefore, arises whether or not it was for the court to determine the interpretation to be given to the statement so written in the application, and to hold as matter of law that it was untrue and constituted a breach of warranty. It may preliminarily be observed that, as a general rule, the construction of a written instrument is a question of law for the

court to determine, but when the language employed is not free from ambiguity, or when it is equivocal and its interpretation depends upon the sense in which the words were used in view of the subject to which they relate, the relation of the parties and the surrounding circumstances properly applicable to it, the intent of the parties becomes a matter of inquiry, and the interpretation of the language used by them is a mixed question of law and fact. (*White v. Hoyt*, 73 N. Y. 505; *Dwight v. G. L. Ins. Co.*, 103 *id.* 341.)”

See also:

West v. Smith, 101 U. S. 263:

Hoffman v. American Mills Co., 288 F. 768 (2 Cir.);
cert. denied 263 U. S. 701;

Williston on Contracts (Rev. Ed.), Vol. 3, §616.

The District Court, after reviewing the evidence, decided this question of fact in favor of the defendants. We set out two of the findings of fact (R. 210, 217):

“40. The oral testimony admitted to resolve the ambiguity on the face of the foregoing instrument establishes that it was intended to be an option fixing a definite price for the stock and which left nothing to the discretion or judgment of the Bank.”

“71. All the parties, including decedent, believed and understood that these instruments constituted an option and its acceptance and that they created a mutually binding contract between the stockholders and the Bank and the instruments were so interpreted by the parties thereto.”

There can be no claim that there was insufficient evidence to support these findings.

A perusal of Judge Burke’s opinion will disclose that he gave this issue his careful consideration. He says (R. 196):

“ . . . The evidence fairly demonstrates that the Bank and the stockholders, including decedent, regarded the sale to Cooley as one made under the definite terms of an option to purchase given by the stockholders to Krauss & Company and that when the option was given the stockholders intended that the price and terms fixed therein were final and definite, and that no other price or terms were to be used in attempting to negotiate a sale.”

Plaintiffs' counsel avoid discussion of this simple and pivotal question which lies at the very threshold of this application. We submit it is decisive in defendants' favor, for even if this Court declines to accept our contention that the instruments to which we have referred of themselves comprised an option and its acceptance, the decision of the question of fact as to what all the parties, including the decedent himself, really intended, binds the plaintiffs. If all of them understood and intended that the writings constituted an option and acted under it, that ends the litigation. It is practically undisputed that this was the fact.

On the question of the intent underlying the instrument of September 26th, the Court had before it the testimony of numerous witnesses. Specifically:

There was the testimony of those who participated in the early negotiations preceding the preparation of the instrument, to wit, Buffington, Cortelyou and Rea. Each of these was thinking unmistakably in terms of “option” or “definite price.” Buffington suggested originally that the Bank “obtain an option from the stockholders . . .,” the reason being that Mr. Glover of the Timken Company “wanted to know a definite price at which he could purchase the business, if he was interested, for a given period of time . . .” (R. 2059-60; and see R. 942). Rea con-

curred (R. 1387-8), adding that the purpose "of procuring the option" was to have some evidence of good faith on the part of the sellers and because "it was necessary to have an instrument on which we could work and rely" (R. 1474). Cortelyou testified that the possibility of negotiating in a case of this character depended on having an "option" or a "call" or "some kind of control" of the stock (R. 943). He stated that instruments of this kind are usually reduced to writing (R. 944), that he understood the instrument in this case to be "an option for the *purchase* at a certain price" (R. 945) and that it was quite usual in a case of this kind for a commission to be paid *either* if the option is exercised *or* if the stock is sold (R. 945-7). This evidence as to custom in a transaction of this character stood undisputed, the plaintiffs having produced no evidence to the contrary.

Then there was the testimony of those who actively took part in the negotiations of September 25th, to wit, Rea, Chisholm, Dave Shultz, Scully and Fisk. This includes the testimony of the *only* two men who represented decedent in the transaction, namely Chisholm and Fisk. We have reviewed the testimony of these witnesses. As pointed out, Chisholm clearly thought that he and the other stockholders were granting an instrument which gave the Bank itself "*the right to purchase*" (R. 736, 1001, 1334). Rea, of course, thought likewise (R. 1387-8, 1389-90, 1453, 1474). Scully was the stockholder who was bargaining for a "better" price, it being at his instance that the clause adding the accrued earnings was inserted in the option (R. 573), a provision wholly unnecessary if the Bank was supposed to get the "best price" it could. Dave Shultz cared not at all who bought the stock—or in fact about anything else as long as he got his money (R. 424-30). And Fisk, decedent's attorney, viewed the matter in the same light (P-

123, P-494b, R. 1523-4), representing decedent in the closing of the transaction on this basis.

Lastly, we have the testimony of those who took part in the discussions and negotiations *after* the instrument was executed. Cooley, for instance, clearly understood that he was buying the stock under an option. He testified that when Rea first approached him he told him that the Bank had "an option on the stock" (R. 1797; and see R. 779). He recalled that in the discussions of October 10th and 11th it was decided that "we must take up this *option*—send out notice taking up this *option*" (R. 1810; and see R. 799). Oishei and Sawyer both understood that the Bank had an option and remembered that the conversations during this period dealt with it in this way (R. 808, 1678, 1690). It is significant that upon the first trial of the Minority Stockholders' Action, Mills, attorney for the stockholders, admitted that under the first paragraph of the instrument the Bank did have the right to purchase, stating "I concede that the Bank could have bought, if they wished, under the first paragraph" (R. 273).

Having in mind the above testimony it seems clear, beyond any reasonable doubt, that all of the parties regarded the transaction as involving an option fixing a definite price at which the stock could be purchased and acted on this understanding. This intent is clearly manifested in the documents themselves.

In reaching his determination on the question of agency, Judge Burke had before him not only the option itself (P-98), but also the Bank's acceptance of October 11th (P-101), the correspondence preceding the execution of the option (P-57, P-61, P-62, P-389, P-436, P-520), the various writings incident to the consummation of the sale (P-116b, P-120, P-121, P-123, P-139, P-542, D-41), and a host of other documents (see, for instance, P-85, P-86, P-112, P-113, P-

393, P-395, P-494b). These, without exception, refer to an "option";⁴ certain of them go further and expressly refer to "an option to purchase" (P-112, P-113), and to an option which had been "assigned" (P-123). Significant among these is the Bank's letter of acceptance of October 11th (P-101). By this writing the Bank not only expressed its belief that it had an option, but also undertook to exercise that option by committing *itself* to the payment of the price therein stipulated. It thus unmistakably indicated its understanding of its arrangement with the stockholders. That the transaction was subsequently closed on this basis, coupled with the fact that the accrued earnings provided for in the option were computed to October 11th, the date of the Bank's acceptance, rather than to October 24th, the date of payment, indicates that the stockholders acquiesced in the Bank's understanding and considered that a binding contract had been concluded on the earlier date.

If there were, therefore, the slightest doubt as to what was intended in the relationship between the parties during the conversations dealing with the sale of the Houde stock, the parties themselves gave to this contract their own practical construction of its terms. The parties were thinking, talking, and, more important, *writing* in terms of an option. The transaction was closed on this basis.

While in affirming the judgment below the Circuit Court of Appeals expressed the view that its determination should follow the "more narrow" lines of the statute of limitations, Judge Clark left little doubt of his position on the question of agency, expressing full agreement with the Trial Court's findings. On this issue Judge Frank differed from his colleague, assigning three reasons.

⁴Under the law of New York State an option is legally defined "as an exclusive privilege to buy * * *" (Farone v. Hall, 128 Misc. 794, 796).

He refers, first to the testimony given by the defendant Wurst in the so-called *Chisholm* tax litigation, some five years after the present transactions. The inferences sought to be drawn from this testimony are not justified. Wurst had had no part in the negotiations leading to the execution of the option. Testifying many years after the event, and on extremely short notice and without an opportunity to refresh his recollection of the facts (R. 1931), Wurst's testimony in the *Chisholm* case indicates that he was testifying, not on the basis of any documents he had then examined or upon a refreshed recollection of the facts, but on the basis of surmise and recollection of events that had transpired many years before. His testimony is replete with such statements as "I have forgotten," "I am not positive", "I don't recall", "I don't recollect", "I can't tell you without looking," "my recollection is vague", etc. (R. 453, 456, 457, 489). During that testimony he referred to the Bank as the "real optionee"; he referred to the instrument of September 26th and to the Bank's letter of acceptance of October 11th as the "contract" under which the Bank acquired the stock (R. 454, 458-9). While in one breath he said he thought the instrument was obtained as agent for the sellers, in another breath he said "We were not acting as agents for anybody" (R. 459). Still again, when questioned as to whom the Bank was acting for, he replied "I never could figure out" (R. 470). He said "We obtained the option and paid for it * * * " (R. 420). He said the Bank "*took this option* in the name of Krauss & Company as its nominee" (R. 454). And while he stated that the question arose as to whether or not the Bank could exercise the option upon the theory that it could not be both a principal and an agent (R. 475), he explained this testimony upon the present trial by stating that this was merely a test which he applied in his own mind and that

he asked Rea at the time and the latter informed him that "There wasn't the slightest doubt in his mind or in the mind of the parties who gave it, but that it was an absolute option, and I accepted it as an absolute option to the best of my ability" (R. 1993). The letter accepting the option which he subsequently prepared (P-101) bears this out.

Wurst testified on the present trial and was examined and cross-examined for many hours, not only with respect to the various transactions underlying this litigation, but also as to his prior testimony involving these transactions. This applies to the other defendants as well. His credibility, as also the credibility of the numerous other witnesses who testified, was entirely a question for the Trial Court. That question has been completely disposed of by the findings.

Judge Frank refers, in the second place, to certain alleged testimony to the effect that at the time a resale to General Motors was being discussed the Bank's officers were "worried" over decedent's attitude; it is argued they would not have been worried had they regarded themselves as entitled to purchase. We are aware of no testimony indicating that defendants were ever "worried" to the slightest degree over decedent's attitude toward a sale to General Motors. When decedent returned from Europe he was concerned over an understanding that such a sale had been made. When he visited the Bank he inquired as to whether that understanding was true. He was told that it was not and that Cooley had bought. The Bank was merely informing decedent what the facts were, and this is all that the evidence establishes (R. 348-9, 377).

Judge Frank argues, in the third place, that no valid "option" for the purchase of the Houde stock could have been acquired by the Bank since such an option would have been in violation of the New York Banking Law (§190 (10))

now §103.) Judge Frank was laboring under a mistaken view of the statute. What the Banking Law prohibited in 1928 was the "investment" by a trust company of more than a certain percentage of its capital and surplus in the stock of private corporations. The taking of an option to buy, a practice followed by all banks and trust companies at the time of these transactions, constituted no such "investment". The Bank never contemplated buying or intended to retain any substantial portion of the Houde stock (R. 482) and when it sent its letter of acceptance of October 11th had already disposed of the commitment in its entirety. The Bank and its securities affiliate later took a total participation of \$1,000,000 in the syndicate which Cooley formed. Since the Bank's capital at this time, consisting of its capital, surplus and undivided profits, amounted to approximately \$18,000,000 (P-591), this obviously was well within the limits of the provisions of the Banking Law referred to by Judge Frank and constituted no violation of that statute.

As shown, the Trial Court had no alternative but to reach the determination it did on the basis of the testimony before it. We go further and state that such determination would have been amply justified even without the benefit of such testimony. The nub of plaintiffs' case on the issue of agency is the fact that the third paragraph of the option provided for the payment of a commission and that such a commission was in fact collected.⁵ There is nothing strange or unusual about a contract which gives an

⁵ The payment of a commission does not of itself necessarily imply fiduciary obligations (Restatement, Agency, § 13, Note 6), particularly where the seller fixes the price and terms of sale (*Gracie v. Stevens*, 56 App. Div. 203, 207, *aff'd* 171 N. Y. 658. *Knauss v. K. B. Co.*, 142 N. Y. 70). An agent may, of course, if it is so understood, "deal on his own account" (Restatement, Agency, §§ 389, 390). "There is no inconsistency in a contract which creates an agency to sell and also gives the agent an option to purchase" (2 Corp. Jur. Sec. 1034).

option and at the same time allows the optionee a commission if it is exercised. The parties can, of course, put their bargain into any form they choose. Construing an instrument in every respect similar to the one here involved the English Privy Council in *Kelly v. Enderton*, L.R.A.C. 1913, p. 191, said:

“Their Lordships are unable to accede to this contention (viz. that the instrument created an agency). The option to Enderton to buy is given in plain and unequivocal terms, and it would require to be shown that the subsequent clause as to commission was necessarily inconsistent with an option to buy to induce them to construe the clause in other than its natural way. But where is the inconsistency? It seems a quite natural thing to say ‘You are to have an allowance of commission of one thousand dollars for finding a purchaser who is able to pay the twenty-five thousand cash and come under the further obligations, and that whether you are yourselves the purchasers or you give the benefit of the option to another purchaser’.”

And as further stated in *Fitzgerald v. Boyle*, 57 Utah 234, 238-9:

“Taking the contract as a whole and giving effect to all of its provisions, we are unable to avoid the conclusion that the intention of the parties clearly was to give plaintiff a right to sell on commission, and also, at the same time, to give him the right to purchase for himself. • • •

The remaining question is whether plaintiff was entitled to a commission when he himself became the purchaser. If he had procured a customer who had purchased, plaintiff would have been entitled to a commission, and defendants would have received the \$3,000, less the commission. They are in exactly the position

financially that they would have occupied in case of any other sale made for them by plaintiff, and that thought may explain why the agreement provided for a commission in the event of either purchase or sale."

The meaning assigned to the instrument of September 26th by the Trial Court was not only the only construction that could be given it under the testimony, but was also the manner in which this very instrument had been construed in earlier cognate litigation. For instance, in the *Chisholm* tax case, the Circuit Court of Appeals for the Second Circuit (79 Fed. (2d) 14, cert. den. 296 U. S. 641) referred to the instrument as a "thirty days' option"; in the *Goetz* case (248 App. Div. 665), Judge Lytle referred to it as "a thirty day option * * * to purchase", and referred to the Bank's letter of October 11th as "the exercise and acceptance of said option * * * ". Upon the first trial of the Minority Stockholders' Action Judge James granted the Bank's motion for a nonsuit upon the ground that the instrument was "an option" which was "complete in itself, containing all the necessary elements, since it specified the purchase price and terms of payment." While upon the subsequent appeal in that case the Appellate Division was of the view that the instrument created a "form" of agency, this was solely on the basis of plaintiffs' testimony, the Bank having rested at the close of plaintiffs' case upon plaintiffs' evidence. In that case the Appellate Division held that no proof of breach of agency had been adduced and affirmed the judgment of dismissal. The dismissal of plaintiffs' case as a matter of law was thereafter unanimously affirmed without opinion by the Court of Appeals of the State of New York (*Shultz, et al. v. Manufacturers & Traders Trust Co.*, 279 N. Y. 781).

Clearly, as between a construction imputing bad faith and one imputing innocence, the Trial Court had little alterna-

tive but to accept the latter (*Simon v. Etgen*, 213 N. Y. 589, 595; *Campbell v. State*, 240 App. Div. 304, 309), especially as the instrument had been drawn in its final form by the attorney for decedent and was therefore to be construed against plaintiffs (*Taylor v. U. S. Casualty Co.*, 269 N. Y. 360; *Evelyn Building Corp. v. City of New York*, 257 N. Y. 501; *Thieler v. Trinity Advertising Corp.*, 241 App. Div. 34, aff'd 265 N. Y. 668; *Gillet v. Bank of America*, 160 N. Y. 549, 554). But in the real sense of the word, there is here no room for "construction". The intent underlying the instrument of September 26th was, at plaintiffs' insistence, the subject of extended testimony on the trial and the matter of such intent was exhaustively considered. The testimony adduced by defendants was credible and convincing. The findings, based thereon, dispose of any question of agency in this case.

2.

Breach of Agency.

In the prior action of the other stockholders (herein referred to as the Minority Stockholders' Action), in which these plaintiffs appeared as *amici curiae*, the charges of breach of agency, as here, consisted of the claims (1) that prior to the Cooley sale the Bank had received and rejected an offer from General Motors in excess of the option price, and (2) that under its arrangements with Cooley the Bank was the real buyer of the stock and thus acquired an improper interest in the subject matter of the agency.⁶ In that case, as here, plaintiffs relied upon the memorandum of October 11th (P-112), there marked in evidence as Plain-

⁶ A copy of the original complaint in the action of Byron D. Shultz against the Bank (D-33) will be found in the printed copies of the exhibits being submitted by the respondents.

tiffs' Exhibit 44. In that case, as here, they argued that by the provisions of this instrument Cooley had "obligated" himself to transfer a minimum of $\frac{7}{8}$ ths of his purchase to the Bank and had thus yielded "control" of the major part of his purchase to the Bank and its officers.

In that action these claims were fully considered and shown to be without substance. Every charge of misconduct advanced here was decided adversely to the stockholders there.

Mindful of this adverse prior determination, and in an effort to escape the effect thereof, plaintiffs take the self-same charges of agency violation that were tendered in the prior litigation and surround them with accusations of fraud and conspiracy.⁷ Upon the claim that the prior action was merely one to recover "damages for breach of a contract of agency or brokerage" (Pet. p. 27), they would have the Court infer that other and different issues are now involved. But the issues are the same. The instrument

⁷ This atmosphere of fraud is of the general pattern sought to be created throughout this litigation. Prior to the institution of this action plaintiffs instituted a proceeding to remove the Bank as a co-executor of decedent's estate. This was done on the basis of a printed petition which they caused to be circulated among the Bank's Board of Directors, and in which they implied that the Bank had caused decedent to commit suicide. This proceeding was dismissed (254 App. Div. 928). Later they brought another action charging the Bank and two members of the Buffalo Bar with fraud in the administration of decedent's estate. This proceeding was likewise dismissed. In this case, although these transactions had been judicially explored in the prior suits, they took nearly 4000 pages of depositions and so abused the privileges accorded them that the defendants were compelled to move to limit the scope of the depositions and for the appointment of a Referee. This application was granted. The trial of this case lasted nearly two months and consumed some 6500 additional pages of testimony. There were charges of spoliation and suppression of evidence, of forgery in the preparation of records, requests for the impounding of documents to permit of their examination by handwriting experts, and other charges of like character. None of these was sustained in any particular (Finding 236-8; R-244-5). In certain instances these charges proved so palpably false that counsel later withdrew them in open court (R. 1304-6).

that is under attack here is the very same instrument that was under attack there; the charges of misconduct here are the same charges of misconduct that were tried and disposed of there.

The charges of conspiracy in this case need not detain us, for they were not proved and in any event add nothing to the cause of action asserted. While we have heretofore said little concerning the position of Eastman Dillon in this controversy—and for the reason that Eastman Dillon is presenting its own position in a separate brief to be filed on its behalf—its situation in the Houde transaction was simply this: In the early part of 1928, it and Central Trust were called into, and assisted in a proposed financing of the Houde Company. This financing was never consummated. Thereafter, it was asked to consider and sponsor a public offering of the stock for Cooley's account, and refused. In the end, Eastman Dillon *did* introduce Harris Small, to whom ultimately a sale *was* made. For their out-of-pocket expenses in connection with their prior efforts over a period of many months on Houde's behalf, Eastman Dillon and Central Trust were each paid the sum of \$15,000 out of the commission earned by the Bank in connection with the Houde sale,—accompanied by the statement that they were being thus favored “not because we feel obligated to do it”, but simply “in appreciation of the efforts which you made to find a purchaser for this stock” (P-85, P-86).

This was the only connection either of these companies had with the entire Houde transaction. When, subsequently, the sale to Cooley was consummated and a syndicate formed, all of which plaintiffs would have the Court believe were in pursuance of a corrupt agreement to lay hold of the stock and to exploit it for the joint benefit of defendants,

neither Central Trust nor Eastman Dillon were invited to participate either in the sale to Cooley or in the syndicate; nor did they thereafter share in any of the syndicate profits. Similarly, when Eastman Dillon later took part in the underwriting in connection with the purchase of the stock by Harris Small and engaged in a public offering of that stock, neither Cooley nor the Bank nor its officers were invited to participate in such public offering and had no part therein. These various transactions were all separate and distinct, and the Trial Court so found (Finding 173; R. 232).

The claim of Chisholm's position in the alleged conspiracy is hardly more convincing. Plaintiffs realized that they could never go to trial in this case in the face of Chisholm's testimony refuting their claims, and they therefore named him as a defendant. They did this to seal Chisholm's lips as to his conversations with decedent and to provide the illusion of bias where Chisholm was concerned by making it appear that his position in the transaction was somehow akin to that of the other defendants and that it was to his interest to stand with them in this controversy. But this charge is without substance, for Chisholm occupied no different position in the Houde transaction than that of the other stockholders. It was to his interest, as it was to theirs, to secure all he could for his stock. Any "representations" that Chisholm made to decedent could only have had the effect of inducing decedent to sell his stock at exactly the same price and under exactly the same terms as he, Chisholm, was selling his own stock in the very same transaction. In short, to defraud decedent, Chisholm was willing to defraud himself of one dollar for every two dollars of which he allegedly defrauded decedent. This theory is past all ordinary human belief.

While still standing on the various charges of fraud and conspiracy advanced at the trial, the specific theory of recovery here asserted by plaintiffs is a very narrow one: simply stated, it is that the sale to Cooley was a fictitious sale, that the Bank and not Cooley was the real purchaser of the stock, and that the Bank's representations to decedent in the matter were fraudulent. This claim rests upon the memorandum of October 11th, already considered. This memorandum was prepared for the purpose of integrating the substance of the conversations between Cooley and the Bank's officers at the time Cooley agreed to buy the stock and was intended to set forth the undertaking of the parties in the contingencies therein enumerated. This memorandum set forth what the Bank's officers obligated themselves to do in the event of Cooley's death or disability prior to the consummation of the purchase; it dealt, also, with Cooley's intentions regarding the possible formation of a syndicate following the acquisition of the stock. It enumerated the various obligations undertaken by the Bank's officers toward Cooley; it contained no surrender of rights by Cooley to the Bank. Under this instrument Cooley yielded no part of his purchase, nor was it intended that he should. It was recited that the officials of the Bank would assist in the formation of a syndicate; however, the formation of such a syndicate was to be solely at Cooley's election. This is implicit in the instrument; it was so understood by the parties.

Plaintiffs frankly concede (Pet. p. 15) that without the memorandum of October 11th they have no case. It is obvious that even with this memorandum there is no case.

In the last analysis, the claim with respect to the memorandum of October 11th is that it gave the Bank an improper interest in the subject matter of the agency. But

when decedent joined the syndicate—and this was long before he was paid in full for his stock—decedent knew the Bank had acquired an interest in Cooley's purchase. He knew this when he joined the syndicate and became aware of who his co-participants were, even if we assume this was his first intimation of the Bank's participation. With this knowledge what did decedent do? On December 6th, knowing about Cooley's purchase, knowing that the Bank had financed such purchase, knowing about the syndicate's acquisition of the stock from Cooley, knowing the identity of his fellow participants, knowing about the public offering and being that very day in receipt of a letter (D-36) forwarding his new stock which was then selling on the Chicago Stock Exchange at a higher price (R. 1786-7), *he then and there proceeded to accept payment not from Cooley, but from the syndicate managers, both of his share of the syndicate's profits and the unpaid balance due him upon the original sale.* He had, under the original option, parted with a 46% interest in the company on the basis of \$1674.75 per share, had received only part payment, had thereafter through a fresh and independent venture reacquired a 1/17th interest at substantially the same price (\$1745.15 a share) and had then, as a co-member of the syndicate, resold his 1/17th interest at a substantially higher price, to wit, at the rate of \$2640.28 a share. He then simultaneously accepted payment of *all* the sums due him on these successive transactions.

Decedent's conduct, of course, recognized that the syndicate had good title to the stock and was free to make a sale thereof. Upon the assumption that the Bank was his agent decedent knew that it and its officers and directors had become participants in a venture which gave them an interest in the subject matter of the agency. Decedent's con-

duct was not mere silence; it constituted active participation in the very transactions now claimed to have constituted the wrongdoing, conduct which knowingly permitted the syndicate to expend upwards of \$45,000 (P-192, D-41) and resulted in a change of position as to its members who were in the situation of innocent third parties (*Baker v. Cummings*, 169 U. S. 189).

Once we eliminate from this case any question of the nature or *bona fides* of the original sale nothing remains. While a good deal of argument has been predicated upon the declaration of October 13th (P-113), already considered, the claims with respect to this instrument warrant but little further comment. Relied upon by Judge Frank merely as "illuminating" the improper character of the original sale as evidenced by P-112, we have shown that this declaration was executed by Cooley only after he had already flatly committed himself to the purchase. The Bank in turn had committed itself to the Houde stockholders by its letter of acceptance of October 11th (P-101). At this date nothing remained to consummate the purchase except to await the computation of accruals, already referred to the company's own auditors, and to pay the price which computation showed to be due. All the parties to the transaction considered that a sale had been agreed upon and that nothing remained to be done except to make payment. As a practical matter the sale was substantially complete (*Robertson v. Chapman*, 152 U. S. 673, *Hermann v. Hall*, 217 Fed. 947). Under such circumstances it was entirely proper for the new purchaser to encourage the further assistance of the Bank's officers with respect to *his* commitment, and in order to do so to declare his intention with regard to such profits as he might realize on resale. Nothing in the instrument can be regarded as creating any conflict

of interest and duty on the part of the alleged agent to its former principals. As pointed out by Judge Clark, the declaration "had nothing to do with the sale".⁸

Stripped of irrelevancies, the underlying facts in this case can be simply stated. The stockholders, at a time when the Houde Company was undercapitalized and its record of substantial earnings had been short, when most of its business was dependent upon a single contract and when its principal patent had only a short time to run, executed an option which entitled them to be paid \$4,000,000 plus accrued earnings for their stock and they were paid in full. This option was prepared in its final form by decedent's own attorney and was executed in his behalf by his own repre-

⁸We cannot leave this subject without taking note of Judge Frank's criticism of the testimony given by certain of the defendants and counsel for the Bank regarding this declaration and the payments later made thereunder.

In footnote 7 Judge Frank quotes Rea's testimony in the *Goetz* case to the effect that Cooley's payment to him following the resale to Harris Small was merely "a very generous gift". He failed to point out that as this matter was further pursued in the testimony in the same case Rea went on to explain that this payment was based upon a percentage of Cooley's profit "when, as and if any profit resulted", that it was paid in recognition of Rea's services and that Rea would not have received this amount if there had not been a resale (R. 506, 509, 519-20).

Judge Frank also misconceived the import of the statement in the affidavit of General Louis L. Babcock, general counsel for the Bank, to the effect that the evidence was conclusive that there was no agreement in advance that Cooley would pay these sums (*i. e.* to Harriman, Wurst and Rea). This statement was absolutely correct. We have pointed out that not only was there no agreement, but also that the declaration of October 13th was executed by Cooley only after the latter had undertaken to purchase the stock and after his intervening negotiations with General Motors. Although, as we have remarked, the plaintiffs have tried to date this declaration *back* to the original sale they utterly failed in this attempt, the Trial Court finding that the declaration was in fact executed the day it bears date.

Judge Frank's criticism of Harriman's affidavit in the same connection is equally unwarranted. While Harriman mistakenly fixed the date of Cooley's declaration as being after Eastman Dillon had reached its decision not to refinance Cooley's purchase, still the fact that such declaration was not made until after the sale to Cooley was completed was entirely accurate and in accordance with the undisputed testimony in the case.

sentative. Both understood it to be an option. Decedent consummated the sale of his stock on the basis of this instrument, receiving nearly \$2,000,000.00 for his interest in a company in which he had invested but little upon its organization only ten years before. After the execution of the option and prior to the sale to Cooley efforts had been made to sell to numerous concerns. These efforts proved unsuccessful. At the time of Cooley's purchase there was no other purchaser for the stock in sight. As Judge Clark said, "There can be no doubt that the Bank and its associates brought to consummation a disposal of these assets where previous efforts had failed".

The sale to Cooley was *bona fide*, Cooley buying and paying for his purchase with moneys raised upon his *own* credit and with his *own* personal collateral. He was a man of ample responsibility for his undertakings. To make the purchase possible the Bank extended its financial assistance on a perfectly proper basis and against security of unquestioned worth, to a purchaser who could not otherwise have been induced to make the purchase. Because a syndicate subsequently organized and in which decedent participated later sold this stock in the inflationary markets of 1928 at a large profit over what the stockholders had asked and received for their holdings, these many lawsuits have arisen.

Plaintiffs' counsel has, from the inception of this case, sought to twist and torture these facts into a wholly unrecognizable story of fraud and misconduct. But none of these charges has been sustained in any particular. The Trial Court, after hearing defendants and on the basis of a record comprising thousands of pages, held that no fraud was proved and dismissed the complaints. Its action stands approved by the Circuit Court of Appeals. Speaking of the charges of fraudulent conduct advanced by plaintiffs, the majority of that Court have said (R. 2336):

“* * * plaintiffs’ claim of conspiracy depends on a highly involved series of inferences, all against the direct findings of the court. They think that a conspiracy of the bank officials and the investment brokers to get possession of the Houde stock, in order to turn it over for large secret profits, matured as early as July, 1928. Hence with decedent in Europe and with Chisholm a co-conspirator, the opportunity arose. The Bank was an agent and a fiduciary, but nevertheless was the real purchaser of the stock and Cooley was only a front for the Bank. And hence the ‘kickback’ arrangement must actually have been made sometime before the claimed sale of October 11 and as a part of the plan. And this conspiracy was carried out by the other steps leading to the disposal of the stock at an advance and division of the profits. And decedent never knew that the Bank, which was actually his agent, was thus constantly working against his interests. But the evidence does not afford a basis for these deductions, and the district court has found directly to the contrary.”

3.

Statute of Limitations.

In their complaint herein, plaintiffs ask (R. 30):

1. That the Bank pay them \$58,207.89, with interest, being decedent’s share of the commission “fraudulently exacted” by the Bank.

2. That defendants be required to “account” to them for all cash or the value of all property received by defendants by reason of their dealings in the Houde stock, this having reference to the profits on the resale to Harris Small.

3. That defendants be required to pay as "damages" decedent's share (46.1302%) of the difference between \$15,729,000.00 (alleged to be the highest market value of the Houde stock within a reasonable time of its acquisition by the Bank) and \$1,844,091.91 (the price received by decedent). Computation of the damages asserted to have been sustained under this paragraph indicates that recovery of \$6,309,741.40 is sought, which, with interest to the time of suit alone, amounting to about 60%, brings the recovery sought to more than \$10,000,000.00.

The prayer of the complaint is for money only. The action presents no equitable feature, except that plaintiffs seek to give it the appearance of an action in equity by asking for an "accounting" in paragraph "2".

Upon the claim that this action is of purely "equitable cognizance" and could not have been brought at law, plaintiffs argue:

1. That the lower Courts erred in applying the New York statute of limitations. Specifically, it is claimed that federal courts of equity are not bound to follow the local law of limitations when to do so will "conflict" with "equitable principles".

2. That even if the New York law be applicable, the lower Courts erred in failing to apply §53 of the New York Civil Practice Act (the 10 year statute dealing with purely equitable causes) and in holding this case to be governed by the provisions of §48 (6 years).

They further argue:

3. That even if §48 is applicable, the case falls within subdivision 5 of that section, which provides that in an action to procure a judgment on the ground of fraud the action must be brought within six years after discovery of the facts constituting the fraud. It is urged that the lower Courts erred in finding as a fact that decedent had sufficient knowledge to start the statute running.

We address ourselves to each of these contentions:

1. The lower Courts properly applied the New York statute of limitations.

Whether on the basis that they were *bound* by the local statutes (*Erie Railroad Co. v. Tompkins*, 304 U. S. 64, *Ruhlin v. N. Y. Life Ins. Co.*, 304 U. S. 202), or that it was *proper* that they should apply these statutes (*Russell v. Todd*, 309 U. S. 280, *Pearsall v. Smith*, 149 U. S. 231, *County v Burlington R. R. Co.*, 139 U. S. 684, *Curtis v. Connly*, 257 U. S. 260), the action of the lower Courts in applying the New York law of limitations was clearly correct. As stated in *Russell v. Todd, supra*, 309 U. S. 280, at p. 293:

“We take it that in the absence of a controlling act of Congress federal courts of equity, in enforcing rights arising under statutes of the United States, will without reference to the Rules of Decision Act, adopt and apply local statutes of limitation which are applied to like causes of action by the state courts.”

The controversy in *Russell v. Todd* arose under a federal statute. The reasons for “adopting and applying local statutes of limitations which are applied to like causes of action by the state courts” are even more compelling in cases where, as here, federal jurisdiction depends on diversity of citizenship alone.

2. The lower courts correctly held that §48, and not §53, of the New York Civil Practice Act, controls this action.

Section 48 of the New York Civil Practice Act (the 6 year statute), in its several subdivisions, and with but the single exception hereinafter noted, applies to causes of action usually denominated as legal; §53 (the 10 year statute) to causes of action exclusively equitable. If, as we contend, the present action is nothing more than one at

law to recover money only, it is clearly governed by the first statute, not the second, and the attitude of federal courts of equity toward local statutes of limitations is not involved. Since the character of the cause of action is controlling, we address ourselves to that question.

The Circuit Court of Appeals, by an unanimous court, has held that the only recovery possibly to be spelled out of plaintiffs' proof was (1) a cause of action for recovery of the Bank's commission, and (2) a cause of action for recovery of the payments by Cooley to the Bank's officers. Our discussion might very appropriately be limited to these two items, items that involved specified, readily ascertainable amounts, that have no equitable features and involved no need whatever for an accounting. It seems hardly necessary to point out, also, that to the extent the complaint seeks recovery of *both* the alleged unlawful "profits" derived from the Harris Small sale (Par. 2 of the prayer) and "damages" for the difference between the value of decedent's stock and what he received for it (Par. 3), there are involved mutually exclusive remedies, any *one* of which may be pursued, but *both* of which may not (Restatement, Agency, §§407, 424, comments (e), (g) and (h); *Taussig v. Hart*, 49 N. Y. 301). We are quite willing, however, to take the complaint as it is, regardless of the deficiencies in plaintiffs' proof and their failure to sustain the allegations thereof. What are the remedies sought thereunder and what cause of action is asserted?

So far as concerns the cause of action for recovery of the Bank's commission (prayer for relief, Par. 1), this clearly involves no equitable features. Recovery of the commission paid to a faithless agent who by his acts has forfeited his rights thereto can be had at law in an action for money had and received, and recourse to equity is not required (*Wechsler v. Bowman*, 285 N. Y. 284, 292).

As concerns the demand for "damages" (prayer for relief, Par. 3), this too is a typically legal cause of action enforced in courts of law, and the jurisdiction of equity is not involved (*Buzard v. Houston*, 119 U. S. 347, *U. S. v. Bitter Root Development Co.*, 200 U. S. 451, *Curriden v. Middleton*, 232 U. S. 633, *Kesner v. Title Guaranty & Trust Co.*, 259 App. Div. 597, aff'd 284 N. Y. 622).

The claim of the inadequacy of the legal remedy therefore rests squarely on the demand for an "accounting" (prayer for relief, Par. 2). It is upon this single paragraph of the prayer that the right of recourse to equity is asserted.

This paragraph deals with the profits derived by the various defendants from their participation in the Cooley syndicate. These profits were *received in money and money alone*. No property was involved. They were derived exclusively from the \$6,000,000 paid to the syndicate managers by Harris Small and distributed through the syndicate managers. The amounts were and are known and definite, being calculated on the same basis as decedent's profits from this same syndicate (R. 238-9). There is here shown no necessity for the impression of a trust or the application of other equitable remedies. (*Schoenthal v. Irving Trust Co.*, 287 U. S. 92, 95; *Gaines v. Miller*, 111 U. S. 395). Indeed, the allegations of the complaint are insufficient to permit the application of any such remedies (*U. S. v. Bitter Root Development Co.*, *supra*, 200 U. S. 451, 475; *Jaffee v. Weld*, 155 App. Div. 110, aff'd 208 N. Y. 593).

The "restitutionary liability" asserted in paragraph 2 of the prayer proceeds upon the theory that the money which defendants received belonged to decedent, and that defendants are under an obligation implied by law to return it. Such a cause of action is quasi-contractual, in the nature of an action for money received, and is en-

forceable in a court of law. The fact that the law may enforce the obligation by the imposition of a trust does not require resort to a court of equity (*Roberts v. Ely*, 113 N. Y. 128; *Mills v. Mills*, 115 N. Y. 80; *Middleton v. Twombly*, 125 N. Y. 520, 524; *Carr v. Thompson*, 87 N. Y. 160; *Keys v. Leopold*, 241 N. Y. 189; *Gervis v. Halsey*, 250 App. Div. 297; *Cwerdinski v. Bent*, 256 App. Div. 612, aff'd 281 N. Y. 782; *Frank v. Carlisle*, 261 App. Div. 13, aff'd 286 N. Y. 586; *Dunlop's Sons, Inc. v. Dunlop*, 259 App. Div. 233, aff'd 285 N. Y. 333; cf. *Banker's Trust Co. v. Hale & Kilburn Corp.*, (C. C. A. 2) 84 Fed. (2d) 401).

In Scott on Trusts, §198.1, it is said:

"Where the trustee is under a duty immediately and unconditionally to pay money to a beneficiary, it is held that the beneficiary can maintain an action of debt or general assumpsit or the modern equivalent of these actions under the codes. * * * In states in which the common law forms of action have been abolished an action at law can be maintained against the trustee where he is under an obligation to pay over money immediately and unconditionally. * * * Where the trustee has wrongfully sold trust property, the beneficiary who is entitled to receive the proceeds can maintain an action at law for money had and received."

Recovery at law in this form of action may be had for the money obtained by agents who profit by concealing from the principal the receipt of a second commission or other inducement from the purchaser (*Wechsler v. Bowman*, *supra*, 285 N. Y. 284; *Graham v. Cummings*, 208 Pa. St. 516); by falsely reporting the price at which they have bought property for their principal (*Sandoval v. Randolph*, 222 U. S. 161; cf. *Byxbie v. Wood*, 24 N. Y. 607); and by wrongfully dealing in the goods of a competitor,

even though no damage to the principal is proved (*Reis & Co. v. Volck*, 151 App. Div. 613).

Where, as here, the cause of action sought to be enforced is essentially one at law based upon an implied obligation to pay over moneys had and received, the six year statute of limitations governs, regardless of whether the action be cast at law or in equity (see cases cited at page 49, *supra*). Its most recent application to actions cast in equity has been to stockholders' derivative actions to recover excessive bonuses from corporate directors (*Cwerdinski v. Bent*, *supra*, 256 App. Div. 612, aff'd 281 N. Y. 782), and to actions to recover profits from the sales to the corporations of property owned by such directors (*Frank v. Carlisle*, *supra*, 261 App. Div. 13, aff'd 286 N. Y. 586; *Dunlop's Sons, Inc. v. Dunlop*, 259 App. Div. 233, aff'd 285 N. Y. 333). In *Frank v. Carlisle*, the Appellate Division said (pp. 15-16):

"However, we go further than Special Term did. We are of the opinion that the 'Oswego' transaction also is barred. In this matter, if we are to cast aside the superfluous allegations which are to be found in the complaint, there is involved simply a sale of stock. *The acts complained of are the acquisitions of properties at a low figure and their resale at a price in excess of that paid by the individual defendants.* Thus plaintiff's cause of action involves a sum of money which can be computed readily. This transaction, according to the complaint, occurred in 1926. Since the complaint was not served until long after the six-year period had expired, this transaction also is barred. (*Potter v. Walker*, 276 N. Y. 15; *Cwerdinski v. Bent*, 256 App. Div. 612, aff'd., 281 N. Y. 782; *Dunlop's Sons, Inc. v. Dunlop*, 259 App. Div. 233.)" (Italics ours.)

The Oswego transaction referred to in the above quotation involved alleged secret profits. The nature of the transaction appears in the opinion in 282 N. Y. 507.

Liability against some of the defendants here is asserted on the basis that they received money with notice, actual or constructive, of a breach of agency. As to them, also, the essential nature of the right asserted is quasi-contractual, in the nature of a cause of action for money had and received. It was enforceable at law and the same statute of limitations applies (*Hart v. Goadby*, 72 Misc. 232; *Banker's Trust Co. v. Hale & Kilburn Corp.*, *supra*, 84 Fed. (2d) 401; *cf. Empire State Surety Co. v. Nelson*, 141 App. Div. 850; *Model Building & Loan Assn. v. Reeves*, 236 N. Y. 331; *Pierson v. McCurdy*, 33 Hun. 520, 529-32, *aff'd* 100 N. Y. 608; *Holt v. Hopkins*, 63 Misc. 537, *aff'd* 136 App. Div. 940; *Price v. Mulford*, 107 N. Y. 303).

In Scott on Trusts, §198.1, it is said:

"Where the trustee has paid trust funds in breach of trust to a third person who has notice of the breach of trust, the third person is liable to the beneficiary in an action at law. So also where the third person has received the money without notice of the breach of trust but has given no value, he is liable in an action at law."

It is evident from the foregoing decisions that the question of the applicable statute of limitations is determined by the essential character of the cause of action sought to be enforced. Where the cause of action is of a *legal* nature ordinarily enforceable at common law, the statute of limitations applicable to such a cause of action will be applied. Resort to equity does not change the character of the cause of action; it is to the cause of action itself that the statute of limitations attaches. This principle was settled at an early date (*Diefenthaler v. Mayor, etc.*, 111

N. Y. 331, 338; *Borst v. Corey*, 15 N. Y. 505; *Butler v. Johnson*, 111 N. Y. 204, 214).

Cases cited by plaintiffs at pages 41-43 of their brief, in which the legal remedy was inadequate, equitable relief was necessary, and the ten year statute of limitations applied, are readily distinguishable. These cases involved the exclusive functions of equity, such as the reformation or cancellation of instruments⁹, the setting aside of conveyances or transactions¹⁰, the appointment of receivers¹⁰, the rescission of contracts¹¹, or the impression of a trust on specific property such as land or securities¹¹. No such relief is sought here. Plaintiffs' objective is money and money only. We have seen no case applying the ten year statute where the cause of action was essentially in quasi-contract for money had and received.

The distinction between the recovery of money and things, as applied to agency cases, is clearly pointed out in Restatement, Agency, §403, comment (f):

"If the agent receives money as a result of breach of loyalty, the principal can maintain an action of quasi contract for the amount. If the agent receives things other than money, the principal can maintain a bill to enforce a constructive trust in the things or, under some conditions, an action for the value of such things."

⁹ *Hanover Fire Ins. Co. v. Morse D. D. & R. Co.*, 270 N. Y. 86. (Reformation of insurance policy.)

¹⁰ *Hearn 45 St. Corp. v. Jano*, 283 N. Y. 139. (Rescission of conveyances in fraud of creditors; impression of a trust, appointment of receiver.)

¹¹ *Falk v. Hoffman*, 233 N. Y. 199 (Rescission of a sale of plaintiff's property and recovery of the proceeds, consisting of cash and securities. The Court held that the purpose of the action was to charge such proceeds with a trust. Plaintiff was entitled to the securities themselves. He could not obtain such relief at law: The statute of limitations was not involved. In the present case, no securities were received by defendants, and plaintiffs have expressly disclaimed that rescission was sought, stating in the Circuit Court of Appeals that "a principal who claims the benefit of secret profits derived from the agency affirms rather than rescinds".)

Brief comment is required by the extravagant claims made for *Potter v. Walker*, 276 N. Y. 15. In that case the ten-year statute was applied to certain directors named as defendants in two causes of action. In one of these the profit derived by defendants was under circumstances involving no correlative loss to the corporation¹²; in the other it consisted almost entirely of securities. In neither instance was the profit received by defendants; it was received by corporations in which they were alleged to have had an interest. Under the circumstances there was no legal right of recovery, and the Court so held. However, the Court was careful to point out that where an action for money had and received would lie, no accounting, and no recourse to equity, was required.

In spite of these facts plaintiffs make the startling claim for *Potter v. Walker* that it "plainly holds that a ten-year statute of limitations is to be applied to any suit for an accounting from a fiduciary who has gained profit from dealing in his fiduciary relation and caused loss to the estate represented by him." (Brief, p. 43).

If the decision stood for any such proposition *Potter v. Walker* would have overruled every case in New York holding that the six, and not the ten-year statute, applies to actions sounding in quasi-contract against agents or fiduciaries. Cases subsequently decided, such as *Frank v. Carlisle* and *Cwerdinski v. Bent*, *supra*, would have gone the other way. That such was not the intention of the

¹² It was alleged that Blair & Co., Inc. had obtained an option to purchase outstanding Pan American stock from E. L. Doheney at \$70 a share. The profit which Blair & Co. Inc. made was derived from the sale of the option to another corporation. The damage to Pan American arose out of a transfer of Pan American assets to Doheney at \$7,802,743.67 less than their value, which the defendant Pan American directors were charged with approving in order to induce Doheney to give the option. The profit involved no loss to Pan American, since nothing more than a sale of an option on outstanding shares of Pan American stock was involved.

Court of Appeals appears from its comment in the *Potter* opinion on the liability of one Stewart, as to which it said:

"The fourth cause of action alleges negligence against the defendant directors for their acts in approving and acquiescing in the payment by Pan-American to defendant Stewart of the sum of \$150,000, which is averred to be a gift. *A remedy at law against Stewart for money had and received would lie and no accounting is necessary.*" (Italics ours.)

That such was not the intention is further evidenced by that Court's comments on the *Potter* case in *Dunlop's Sons, Inc. v. Dunlop, supra*, 285 N. Y. 333, where the Court said:

"*Per Curiam. Potter v. Walker* (276 N. Y. 15) did not decide that the ten-year Statute of Limitations (Civ. Prac. Act, §53) is necessarily applicable to all cases in which corporate directors have profited in any degree through a breach of their fiduciary duties. In such a case an action for an accounting may be brought only for the recovery of gains received by the directors beyond the amount of losses caused to the corporation by their wrong¹³. Where, as in the present case, the gains received by the directors do not exceed the correlated losses suffered by the corporation, no accounting is necessary and the Statute of Limitations which controls the remedy at law is to be applied. (See *Goldstein v. Tri-Continental Corp.*, 282 N. Y. 21.)"

In attacking the adequacy of the legal remedy in the case at bar, plaintiffs do so on the grounds of (1) the as-

¹³ In the case at bar the aggregate of the gains to defendants, which amounted only to what they received from the syndicate managers, not only did not exceed but in fact was but a small fraction of the correlated loss of upwards of \$6,000,000 claimed to have been sustained by decedent. Thus the *Dunlop* decision precluded an accounting here. See also *Corash v. Texas Co.*, 264 App. Div. 292.

serted difficulty as to parties, and (2) the asserted difficulty as to remedies.

As to the asserted difficulty involving the parties, plaintiffs argue that this action could not have been maintained at law because the Bank is an executor of decedent's estate, is a necessary party, and could not have been sued in an action at law by its co-executors, the plaintiffs herein.

This argument disregards the fact that the circumstances neither required a resort to equity nor changed the essential nature of the cause of action. Under the interpretation given to New York Civil Practice Act §194 (*cf.* F. R. C. P. 19), the section dealing with joinder of parties in interest, and such other related sections as New York Civil Practice Act 193, 209, 210, 211, 212 and 213 (*cf.* F. R. C. P. 19, 20), equitable rules as to joinder of parties are made applicable to actions at law (Pomeroy, *Code Remedies*, 5th Ed. §§50, 113, 117, 119, 122). Such sections have been held to permit actions at law where formerly it was necessary to resort to equity because of difficulties as to parties. (*Porter v. Lane Construction Corp.*, 212 App. Div. 528, *aff'd* 244 N. Y. 523; *Schechtman v. Salaway*, 204 App. Div. 549; *Benton v. Deininger*, 21 Fed. (2d) 657; 2 Carmody's New York Practice §503; *cf. Gen. A. F. & L. Assur. Corp. v. Zerbe Const. Co.*, 269 N. Y. 227, 233). Under the liberal modern practice the suit at bar clearly could have been maintained at law.

In support of the contention that difficulties as to parties necessitated a resort to equity, *Rundle v. Allison*, 34 N. Y. 180 is the only decision cited by plaintiffs which involves the statute of limitations. There the court applied the ten-year statute under circumstances which it was careful to point out were "special" and "peculiar."

The case involved the enforcement of a right which from the inception of the contract which created it was

cognizable only in equity. It involved the *internal administration of an express trust*, over which courts of common law have never had jurisdiction. Furthermore, as the court pointed out (p. 183), "no *legal* contract could exist between herself, on the one side, and herself, with others connected with her, on the other side." A contract of this type of course creates rights cognizable only in equity (1 Williston, Contracts, Sec. 18).

The right sought to be enforced was thus equitable from its inception, and the resort to equity was necessitated by difficulties as to parties *to the contract*, and not merely by difficulties as to parties *to the action*, which is the consideration urged here.

The case at bar was very different. Here decedent's rights, if any, accrued in 1928 and were then enforceable by him in a court of law, by action in quasi-contract, or for damages. Their essential character was not equitable. It is now asserted that because of decedent's death and the appointment of one of the alleged wrongdoers as one of his executors, a resort to equity was necessary, and therefore the character of the right, to which the statute attaches, became equitable, bringing into play an entirely different statute of limitations than that which originally applied. The application of statutory bars is not governed by circumstances so fortuitous. Substance, not form, must be considered. Certainly such events cannot operate to deprive defendants of the benefit of the statute of limitations applicable to legal causes of action.

A conclusive answer to the argument that difficulties as to parties or procedure, necessitating a resort to equity, bring into play the ten-year statute is furnished by *Potter v. Walker, supra*, 276 N. Y. 15. There it was strenuously contended that no matter what the nature of the right sued upon may be, whether legal or equitable, a stock-

holder's derivative action, which under New York law must necessarily be in equity, is always governed by the ten-year statute (p. 17). The contention was forcefully rejected, the Court adopting (p. 27) the following quotation from an opinion by Mr. Justice Lurton:

“ ‘Moreover, the essential character of a cause of action belonging to a corporation remains the same, whether the suit to enforce it be brought by the corporation or by a shareholder. Thus a legal right of action would not be treated as an equitable one, or become governed by the rules applicable to equitable causes of action, *as to limitations, etc.*, because a shareholder has brought suit in equity to enforce it on behalf of the company.’ ”

See also *Russell v. Todd*, *supra*, 309 U. S. 280; *Scott v. Allen*, 264 App. Div. 424, and decisions cited at pages 51-2 of this brief.

Here, the action is representative in that the right sued upon is decedent's right. The essential character of the cause of action remains the same. Neither the form of the action, nor any difficulty as to parties, can change its nature.

Plaintiffs' second contention is that only an accounting would furnish adequate relief. They say that an action at law would not permit them to hold defendants jointly and severally liable, while in equity such liability could be enforced.

This argument is without merit. The nature of the liability depends on the facts and not the forum. There is no fundamental difference in law and equity in this respect. Plaintiffs assert that defendants were liable to make restitution in equity because they were constructive trustees of the money they received through the syndicate. In the case of a constructive trust, as in the case of quasi-contract, the restitutionary obligation is imposed in

order to prevent unjust enrichment. The same basic principles govern both remedies (*Bankers Trust Company v. Hale & Kilburn Corporation*, *supra*, 84 Fed. (2d) 401; *Myers v. Hurley Motor Company*, 273 U. S. 18, 24). Since both remedies rest upon the same fundamental doctrine, the question of joint and several liability is one of substantive law, and the principles upon which this point is determined are the same at law as in equity. Joint liability has been imposed in actions at law for money had and received when the facts warranted it (*Cobb v. Dows*, 10 N. Y. 335, 346; *New York Guaranty & Indemnity Co. v. Gleason*, 78 N. Y. 503; *Hart v. Goadby*, *supra*, 72 Misc. 232, 239). The contention now advanced by plaintiffs was borrowed from the Special Term decision in *Dunlop's Sons, Inc. v. Dunlop*, 172 Misc. 66, in a case where the two defendants were alleged to have divided the profit, but the Appellate Courts took a contrary view and held that the remedy at law was adequate (259 App. Div. 233, 285 N. Y. 333). Other cases involving numerous defendants in which the legal remedy was held adequate, are: *Frank v. Carlisle*, *supra*, 261 App. Div. 213, *aff'd* 286 N. Y. 586, and *Cwerdinski v. Bent*, *supra*, 256 App. Div. 612, *aff'd* 281 N. Y. 782.

Judge Clark held that "no ground was shown here for purely equitable relief." (R. 2336). In this he was entirely correct. So far as the "restitutionary", (*i. e.*, "accounting") cause of action is concerned, an action at law in quasi-contract was fully as adequate and effective as relief in equity. The defendants received money and money only, through the syndicate managers. If liability existed, it could have been enforced fully at law. There is literally nothing which the arm of equity could have been called upon to perform which the available remedies at law would not have afforded plaintiffs.

3. Section 48 of the New York Civil Practice Act bars this action, whichever of its subdivisions be deemed to control.

It having been demonstrated that the case was not exclusively equitable in character, and that therefore neither the question of the effect of local statutes of limitation in federal equity courts nor the applicability of C. P. A. §53 was involved, it remains only to consider whether the correctness of the decision of the Circuit Court of Appeals, in holding that C. P. A. §48 barred relief, presents a question which this Court will review.

That statute contained the following provisions from 1928 to 1936¹⁴:

"§48. Actions to be commenced within six years. The following actions must be commenced within six years after the cause of action has accrued.

1. An action to recover upon a contract obligation or liability express or implied, except a judgment or sealed instrument. * * *

3. An action to recover damages for an injury to property, or a personal injury except in a case where a different period is expressly prescribed in this article. * * *

5. An action to procure a judgment on the ground of fraud. The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud."

It is quite immaterial here whether the action be regarded as one, a) for "restitution", or b) to recover "damages", or both. The so-called "restitutionary" cause of action is barred by Subdivision 1, quoted above, which allows six years for "an action upon a contract obligation or liability, express or implied * * *";

¹⁴ Subdivisions 1 and 3 were amended by L. 1941, ch. 329 and L. 1936, Ch. 558, respectively, but their provisions as set forth above apply to this action.

the cause of action for "damages" is barred by subdivision 3, which allows six years "to recover damages for an injury to property * * *" (*Carr v. Thompson*, *supra*, 87 N. Y. 160, *Brick v. Cohn-Hall-Marx Co.*, 276 N. Y. 259, *Adolf Gobel, Inc. v. Hammerslough*, 263 App. Div. 1, *aff'd* 288 N. Y. 177 (mem.)). It is immaterial that fraud, or fraudulent concealment, is alleged and proved (*Wechsler v. Bowman*, *supra*, 285 N. Y. 284, 293); it is equally immaterial whether the cause of action sounds in contract or tort (*Brick v. Cohn-Hall-Marx Co.*, *supra*, 276 N. Y. 259, *Keys v. Leopold*, *supra*, 241 N. Y. 189; *Kesner v. Title Guarantee & Trust Co.*, *supra*, 259 App. Div. 597, *aff'd* 284 N. Y. 622; *Potter v. Walker*, *supra*, 276 N. Y. 15, 26-27). Under both of these subdivisions the statutory period began to run at the time of the transactions alleged to have given rise to the cause of action, and did not depend on the ignorance or knowledge of decedent (*Schmidt v. Merchants Dispatch Transportation Co.*, 270 N. Y. 287, 300, *Carr v. Thompson*, *supra*, 80 N. Y. 160, *Hart v. Goadby*, *supra*, 72 Misc. 232, *Watkins v. Madison County Trust Deposit Co.*, 24 Fed. (2d) 370 (C. C. A. 2), *Miller v. United States Gypsum Co.*, 96 Fed. (2d) 69 (C. C. A. 2).

Judge Frank thought that plaintiffs had two causes of action, one to recover decedent's share of the money paid by Cooley to the Bank's officers, and the second to recover decedent's share of the Bank's commission. He had no doubt that the cases, including *Wechsler v. Bowman*, *supra*, 285 N. Y. 284,¹⁵ barred recovery of the Cooley payments

¹⁵ The intimation that the *Wechsler* case has been overruled by the decision in *Nasaba Corp. v. Harfred Realty Corp.* 287 N. Y. 290, decided less than a year later, and containing no reference whatsoever to the *Wechsler* decision is without foundation. The *Nasaba* case was an action for damages only and involved no question of agency. The case arose before answer on a motion addressed to the complaint. On the allegations of the complaint the Court held that a cause of action for *fraud* was alleged, which brought the action under §48(5) of the New York Civil Practice Act making the time of the discovery of the fraud the essential, controlling factor. The nature of the restitutionary liability of defaulting fiduciaries was not considered.

(R. 2346). He did doubt that it barred recovery of the commission, but this doubt was not well-founded. It seems clear that had the agent in the *Wechsler* case "retained" the commission paid by the principal instead of receiving it under an arrangement which constituted him a mere "conduit" for its passage to the guilty executor, there would have been created an implied promise to repay, upon which recovery could have been based. In that event the cause of action for recovery of the payment by the principal would have been barred under §48(1) just as was the cause of action for recovery of the payment by the purchaser which was retained by the agent. This conclusion is not occasioned by any dictum, as Judge Frank says; it is predicated upon reasoning essential to the result in the *Wechsler* case.

This leaves only the question of the applicability of §48 (5) which deals with actions "to procure a judgment on the ground of fraud". Unless allegations and proof of actual fraud were essential to the recovery sought, actual fraud being the gravamen of the cause of action, §48(1) and (3) are the controlling limitations, and §48(5) is inapplicable. (*Wechsler v. Bowman, supra*, 285 N. Y. 284, 293; *Brick v. Cohn-Hall-Marx Co., supra*, 276 N. Y. 259; *Adolph Gobel, Inc. v. Hammerslough, supra*, 263 App. Div. 1, aff'd. 288 N. Y. 177 (mem.); *Carr v. Thompson, supra*, 87 N. Y. 160; cf. plaintiff's brief, pp. 34-35). In the lower courts the plaintiffs, realizing that they had failed utterly to establish fraud, urged that they were entitled to recover *without* proof of fraud. Liability, they said in their brief in the District Court, existed even though the intentions of the defendants were "pure as the driven snow" and though the Houde stock was not worth "a thin dime" (Page 118). Both the Trial Court and Judge Clark took cognizance of this contention (R. 198, 2333).

In their present application they return to the fraud thesis in order to escape the clear bar of §48(1) and (3). But here again their contention is wholly without merit and the courts below so found. In considering §48(5) the following legal principles must be borne in mind.

No problem as to the essential character of the action, whether legal or equitable, is presented under this section, which applies whether the action is cast at law or in equity (*Hopkins v. Lincoln Trust Co.*, 233 N. Y. 213, 214-15). The statute is thus applicable in the federal courts, whether the suit be at law or in equity. (*Russell v. Todd*, *supra*, 309 U. S. 280; *Ball v. Gibbs*, 118 Fed. (2d) 958).

While under this statute the cause of action is not "deemed to have accrued until the discovery" of the fraud, the cases clearly hold that when there is knowledge of sufficient facts to suggest the need of inquiry the statute begins to operate; knowledge of the details is unnecessary (*Higgins v. Crouse*, 147 N. Y. 411; *Sielcken-Schwarz v. American Factors, Ltd.*, 265 N. Y. 239; *Klotz v. Angle*, 220 N. Y. 347; *Coffin v. Barber*, 115 App. Div. 713; *Ectore Realty Co. v. Manufacturers Trust Co.*, 250 App. Div. 314; *Kellogg v. Kellogg*, 169 App. Div. 395, *aff'd.* 224 N. Y. 597).

This rule is uniformly recognized and applied in the Federal Courts (*Talmadge v. U. S. Shipping Board*, 54 Fed. (2d) 240; see also *Wood v. Carpenter*, 101 U. S. 135; *Foster v. Mansfield, etc., R. Co.*, 146 U. S. 88, *Dugan v. O'Donnell*, 68 Fed. 983, 992-3; *Prentiss v. McWhirter*, 63 Fed. (2d) 712; *United States v. Christopher*, 71 Fed. (2d) 764; *Cooper v. Ohio Oil Co.*, 25 Fed. Supp. 304, 311, *aff'd.* 108 Fed. (2d) 535; *Baker v. Cummings*, 169 U. S. 189).

The burden of proving that the cause of action herein accrued less than six years prior to the commencement of this action was on the plaintiffs (*Mason v. Henry*, 152 N. Y. 529; *Jelliffe v. Thaw*, 67 Fed. (2d) 880). This burden they undertook, but failed to discharge. Although plaintiffs in-

sisted upon a strict compliance with §347 of the New York Civil Practice Act, defendants proved affirmatively that decedent was intimately connected with all the Houde transactions and, as the Trial Court found, had actual knowledge of the "basic and material facts" (Finding 239; R. 245). This was sufficient to start the statute running.

The findings cover in detail the knowledge indisputably possessed by decedent and his participation in the transactions¹⁶. To summarize briefly:

Upon plaintiffs' theory decedent entered into an agency relationship with the Bank, and the Bank and its officers thereafter improperly acquired an interest in the subject matter of the agency. Upon this theory of the case, Shultz knew that the Bank was his agent. He knew that Cooley was purporting to buy the stock. He knew that Cooley was a director of the Bank¹⁷. He knew that the Bank was advancing the money to finance Cooley's purchase. He knew that the Bank had undertaken to see that Cooley made payment of the deferred balance of the purchase price of his stock. He knew that about a week after he had delivered his stock for Cooley's purchase, *and before he received full payment for it*, Cooley was organizing a syndicate to acquire the stock at the same price he had paid for it, and that the Bank, its investment affiliate, and many of its of-

¹⁶ See, particularly, Findings 12, 13, 17, 18, 19, 23, 36, 48, 49, 50, 51, 53, 67, 68, 70, 71, 73, 94, 95, 99, 102, 103, 105, 106, 107, 110, 111, 112, 114, 115, 116, 130, 131, 132, 139, 162, 163, 164, 165, 166, 167, 168, 174, 176, 193, 197, 199, 200, 203, 204, 205, 206, 213, 214, 215, 216, 217, 218, 219, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 239 (R. 205-45).

¹⁷ This fact alone was sufficient to start the statute running. If there was agency, Cooley, as a director of the Bank, was under a disability to purchase (*Scott on Trusts*, §170.11; *Chicago, etc. Ry. v. Des Moines, etc. Ry.*, 254 U. S. 196, 212). Knowledge of any invalid feature in the transaction was sufficient to constitute accrual of the cause of action. (*Baker v. Cummings, supra*, 169 U. S. 189, 197-98; cf. *Talmadge v. U. S. Shipping Board, supra*, 54 Fed. (2d) 240, 243). Judge Frank's remarks on this subject at R. 2341 were addressed to the question of ratification or acquiescence. The degree of knowledge required to bring into play the statute of limitations is substantially less.

ficers and directors were participating in the syndicate. He knew that certain officers and directors of the Bank had been elected officers and directors of Houde. He knew that the syndicate agreement reserved 25% of any profit to Cooley and that this 25% was payable to Cooley or his "assigns". He knew of the sale by the syndicate to Harris Small, and was advised to the penny of the amount received by Cooley and the basis of the calculation of the profits of the other subscribers. He received and retained his syndicate profit of \$76,942.39. He participated to his profit in the subsequent public sale of stock of the newly organized company. *He was the only one who participated in all the Houde transactions.* He continued his connection with Houde as president after the old officers had resigned and became an officer and director of the newly-formed Michigan corporation.

The courts below quite properly, and in accordance with the well recognized rule in New York, held that this knowledge possessed by decedent was sufficient to start the statute running. As stated in *Higgins v. Crouse, supra*, 147 N. Y. 411, 415-6:

"Fraud lies in the intent to deceive, but the mental emotion is inferred from the facts which indicate it, and it is with those facts and the inferences to which they lead that the law necessarily deals. When, therefore, facts are known from which the inference of fraud follows, there is a discovery of the facts constituting the fraud and within the precise terms of the statute. That the defrauded party did not actually draw the inference, but shut his eyes to it, does not stop the running of the statute. He ought to have known, and so is presumed to have known, the fraud perpetrated. * * * Let us suppose that the injured party does not know all the facts, is not aware of enough of them to justify a decided inference of fraud, but does know

sufficient to fairly arouse suspicion, to create a probability, to suggest the need of an inquiry. Can a party so situated omit all investigation, remain purposely blind, neglect the duty of inquiry, when reasonable and natural action would reveal the truth and disclose the fraud? I think not. In such a case it seems to me that we are bound to impute to the party the knowledge which he ought to have had and would have had if he had done his duty, and say for the purpose of the Statute of Limitations that there was in law a discovery of the facts which constitute the fraud. Certainly there was a discovery of some of them, and the party should be charged with a knowledge of the rest when he might and should have known them."

In Conclusion.

The application for certiorari should be denied.

Respectfully submitted,

HAROLD R. MEDINA,
LOUIS L. BABCOCK,
NOEL S. SYMONS,
MASON O. DAMON,
WILLIAM GILBERT,
Respondents' Counsel.



OCT 3 1942

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IN THE

Supreme Court of the United States

October Term, 1942.

No. 404.

WYATT D. SHULTZ and CAROLYN SHULTZ, as
Co-Executors under the Last Will of Albert B.
Shultz, Deceased,

Petitioners,

vs.

MANUFACTURERS & TRADERS TRUST COMPANY,
Individually and as Co-Executor under the Last Will
of Albert B. Shultz, Deceased, *et al.*,

Respondents.

ADDITIONAL EXHIBITS REFERRED TO IN BRIEFS
OF RESPONDENTS SUBMITTED IN OPPOSITION
TO APPLICATION FOR CERTIORARI.

HAROLD R. MEDINA,
LOUIS L. BABCOCK,
NOEL S. SYMONS,
MASON O. DAMON,
WILLIAM GILBERT,

Respondents' Counsel.

Table of Contents

This pamphlet contains copies printed for the court's convenience of those additional exhibits (the originals of which were duly filed with the clerk of this court pursuant to order of Hon. Harold P. Burke, D. J.) deemed by respondents essential to passing on this petition. These exhibits are submitted in chronological order. A numerical index follows:

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P-29	Letter from Central Trust to Bank, dated June 6, 1927	1
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P-31	Letter, Central Trust to Bank, dated June 17, 1927	3
P-74	Letter, Eastman, Dillon to Bank, dated October 31, 1928	19
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D-33	Copy of original complaint in action of Byron D. Shultz v. Manufacturers & Traders Trust Company, verified November 2, 1934	34
D-36	Carbon of letter, Harris, Small to decedent, dated December 5, 1928, with receipt thereon executed by decedent	33
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[Defendants'] Exhibit P-29.*

(Received in evidence 11/15/40, R. 954)

Letterhead of
CENTRAL TRUST COMPANY OF ILLINOIS
Chicago, Illinois

Chicago, June 6, 1927

Mr. George P. Rea, Vice President
Manufacturers & Traders-Peoples Trust Company
Buffalo, N. Y.

Dear George:

I had a chance to talk to our people here today about the Houde Engineering Co., and I am afraid that on the basis of any showing they have made so far their price is clear out of line. I understood from you over the telephone that they were prepared to demonstrate they had made \$400,000 last year but I did not see a fair demonstration of that in any of the additional data you sent. What is your opinion on this? Do you think they made any such amount? I would have to be pretty thoroughly sold on the matter to be interested on the basis of over \$2,000,000.

It seems to me, therefore, it might be better to let the matter ride until my next visit to Buffalo, which might be in the near future. At that time you could probably put me in touch with the principals and we could have a talk with them together.

Yours very truly,

JAMES G. ALEXANDER
Executive Vice President.

JGA-ALM

*Identified as Ex. P-29 on depositions herein.

[Defendants'] Exhibit P-30.*

(Received in evidence 11/15/40, R. 954)

June
7th,
1927.

Mr. James C. Alexander,
Central Trust Company of Illinois,
Chicago, Illinois.

Dear Jim:

I have your letter this morning in regard to the Houde Engineering Company. They actually showed last year \$180,000.00, after charging off everything possible; and after such items as \$125,000 in advertising; \$75,000. in engineering and some items which they claimed are not going to be spent in the future.

The picture is one of those things that I think you must know intimately as to the current conditions, rather than to judge it solely on the actual figures of past performance.

Their asked price of \$2,400,000., as I said to you, seems awfully high, and yet they have got a good deal to talk about in discussing their company.

I think you would be very much interested, if you are interested at all, in spending the necessary time to talk with the principals, and I would suggest that if you have any choice as to a trip to Buffalo that you make it sooner rather than later, as various people have been, and are, flirting with the company with ideas similar to yours.

Let me have some warning as to when you might come, if possible, so that I can arrange to have the right people here.

Yours very truly,

GPR:GW

* Identified as Ex. P-30 on depositions herein.

[Defendants'] Exhibit P-31.*

(Received in evidence 11/15/40, R. 954)

Letterhead of
CENTRAL TRUST COMPANY OF ILLINOIS
Chicago, Illinois

June 17, 1927.

Mr. George P. Rea, Vice President
Manufacturers & Traders Trust Company
Buffalo, N. Y.

Dear George:

After returning from the east I had an opportunity to talk with Cortelyou relative to the Houde business and have come to the conclusion that their price is quite out of line. I do not mean by that they are not justified in keeping the business, unless they can get this price, but it is capitalizing the future to too great an extent for new people to come in.

Let us keep in touch with the matter, and possibly conditions may change a little bit so that we may work something out. I will discuss it further with you the next time I am in Buffalo, and in the meantime I think you had better advise the principals that we are not interested at the figures suggested.

Yours very truly,

JAMES G. ALEXANDER
Executive Vice President.

JGA-ALM

* Identified as Ex. P-31 on depositions herein.

[Defendants'] Exhibits P-24a/b.*

(Received in evidence 11/26/40, R. 1088)

(Copy)

FORD MOTOR COMPANY
Detroit, U. S. A.

January 20, 1928
Attention Mr. A. B. Shultz
President

Houde Engineering Corp.,
Buffalo, New York.

in replying refer to P-

Gentlemen:

Referring to shop right dated January 20th, 1928, which grants us, for a consideration, the right to manufacture and have manufactured, shock absorbers, under patents owned or controlled by Houde Engineering Corporation, we agree to incorporate in our orders and specifications to such companies or outside organizations making such shock absorbers a statement as follows:

“The Second Party, in the acceptance of this purchase order agrees not to engage in the manufacture or sale of Houdaille shock absorbers for use or sale to any person or persons other than the First Party, during the execution of this order, or for a period of two years after the completion of this order.”

FORD MOTOR COMPANY
A. M. WIBEL (Signed)
Purchasing Agent

* This is the same as the exhibit annexed to Defendants' Exhibit P-63. These exhibits were identified as P-24 a & b on depositions herein.

(Copy)

Detroit, Michigan
January 20, 1928

Ford Motor Company
Highland Park, Michigan.

Gentlemen:

In consideration of your purchase orders Nos. H-20315 and H-20314, dated January 20th, 1928, for Fifty Thousand (50,000) clockwise, and Fifty Thousand (50,000) anti-clockwise Houdaille shock absorbers respectively, less lever, drag link, or fittings, as specified in said purchase orders, at a cost to you of \$2.37 each, F. O. B., Buffalo, the said shock absorbers being more particularly identified by your blue print No. A-18015-B, our No. 1-461, clockwise, and your No. A-18016-B, our No. I-462, anti-clockwise, we hereby grant to the Ford Motor Company, its subsidiaries and associated companies, an irrevocable temporary license for a period of two years from the date hereof, to make, or have made, use, and sell shock absorbers embodying the invention or inventions disclosed in any and all patents or patent applications, both in the United States and foreign countries, which are now owned and/or controlled by us or which may hereafter be acquired by us during the life of this agreement which relate to Hydraulic shock absorbers or their parts.

It is understood, however, that the temporary license hereinabove granted shall become permanent and irrevocable when you shall have purchased from us an aggregate number of One Million, Eight Hundred Forty Thousand (1,840,000) shock absorbers of substantially the type above mentioned. Said temporary license shall commence immediately and shall run until the completion of the purchase of said One Million, Eight Hundred Forty Thousand, (1,840,000) shock absorbers, at which time the temporary

license shall automatically become permanent without any additional writing.

It is further understood that the additional number of shock absorbers, above the initial number of One Hundred Thousand (100,000), appearing on purchase orders Nos. H-20313 and H-20314, hereinbefore mentioned, will be furnished you at a price to be mutually agreed upon between the parties hereto, but not to exceed \$2.37 each.

It is further understood and agreed that we are at no time during the life of this agreement to be compelled to manufacture and furnish you with more than 4,000 Houdaille shock absorbers on any working day of 24 hours unless otherwise agreed upon between us, deliveries to be governed by shipping specifications on your purchase orders and release authorizations.

It is further understood that the undersigned are the owners of or control the following enumerated patents or patent applications:

Feb. 10, 1914	1,087,017
May 17, 1927	1,628,811
May 10, 1927	1,627,810
Aug. 15, 1922	1,426,115
Aug. 17, 1923	1,451,964
June 1, 1915	1,141,246
Jan. 3, 1922	1,402,610
July 1, 1924	1,499,660

Applications

Mr. Shultz—Serial No. 170628

Mr. Shultz—Serial No. 85677

It is further understood that this license shall extend only to shock absorbers and parts for shock absorbers for use in connection with products manufactured by the Ford Motor Company, its subsidiaries and its associated companies.

It is further mutually understood and agreed that each of the parties shall have the right to use any of the methods or improvements that may be developed by either party hereto during the life of this agreement, in the manufacture by it of the Houdaille Shock absorber hereinbefore identified by said blue prints, your No. A-18015-B, our No. I-461, clockwise, your No. A-18016-B, our No. I-462, anticlockwise.

We hereby covenant that we own or control the rights purported to be given hereby and further agree to take any additional step or steps or sign any additional papers which may be necessary to lodge said rights in said licensees and to enable the licensees named herein to sell hydraulic shock absorbers of the type specified in countries foreign to the United States as standard equipment on motor vehicle products manufactured by said licensees.

It is further understood that the Ford Motor Company does not expressly or impliedly admit the validity or infringement of any patents under which it is herein licensed.

HOUDE ENGINEERING CORPORATION
By A. B. Shultz
President

[Plaintiffs'] Exhibit P-282.*

(Received in evidence 12/2/40, R. 1372)

50,000 Class A Shares, bearing \$2.00 per annum cumulative dividend—preferred as to assets—callable at 40—to be bought at 20—A Stock to be participating to \$4 per share and convertible share for share.

100,000 Class B Shares to present stockholders—50,000 additional shares held in reserve for conversion.

After \$100,000 or \$2 per share dividend on A Stock, then \$100,000 or \$1 per share can be paid on B stock—of any additional amount set outside for dividends, one third be paid on A stock, $\frac{2}{3}$ on B or in other words, the same dividend per share, until A has received \$4, then participating feature on A ceases.

Option on 30,000 shares of the issued B stock, an amount necessary for listing—length of option suggested is two years—price to of option to be agreed upon—Recommend \$10 per share if earlier listing is desired as compared to what could probably be done at some higher option price.

* This exhibit is in the handwriting of A. B. Shultz (see stipulation at transcript of record, page 437). It was marked Ex. P-282 on depositions herein.

[Plaintiffs'] Exhibit P-389.*

(Received in evidence 11/18/40, R. 967)

CHICAGO

EASTMAN, DILLON & Co.

To Buffalo Office

9/24/28

Please say to George Rea, Manufacturers & Traders Bank:

Have appointment arranged with people here for tomorrow morning. Therefore suggest postponing trip to Buffalo until later in week. Strongly urge that you secure option today. Seeing Glover's lawyers this afternoon. If there are other questions will telephone.

G. N. BUFFINGTON

* Identified as Ex. P-389 on depositions herein.

[Plaintiffs'] Exhibit P-391.*

(Received in evidence 11/18/40, R. 967)

CHICAGO
EASTMAN, DILLON & Co.

To Buffalo office

9/25/28

Please say to George Rea, M. & T. Bank, Buffalo:

Cannot proceed further with people here until I can disclose contract and recent balance sheet. Will be here tonight until 5:30 our time.

G. N. BUFFINGTON

* Identified as Ex. P-391 on depositions herein.

[Plaintiffs'] Exhibit P-392.*

(Received in evidence 11/18/40, R. 968)

CHICAGO
EASTMAN, DILLON & Co.

To Buffalo office

9/25/28

Please say to George Rea, M & T Bank, Buffalo:

Have had talk with Bendix personally and find him very much interested. Leaving for New York tomorrow. Wants figures quickly as possible. Can have meeting later in week. Interesting to know that he knows good deal about situation. Advise me soon as possible your position.

G. N. BUFFINGTON.

* Identified as Ex. P-392 on depositions herein.

[Defendants'] Exhibit P-494b.*

(Received in evidence 12/3/40, R. 1521)

OFFICE MEMORANDUM*Name**Houde Engineering*

1928

- Sep 24 to conf with Jellinek—sale of city
 25 to conf with Mr. Shultz & Mr. Chisholm this evening and revision of option
 Oct 9 to conf with Swart & letter to you—Hiram Huert proceeding
 16 to conf at M & T with Wurst Sawyer & later with Dave Shultz, & later with Sawyer—stock records.

* Office memorandum in handwriting of Irving L. Fisk. Identified as Ex. P-494b on depositions herein.

[Plaintiffs'] Exhibit P-393.*

(Received in evidence 11/18/40, R. 968)

CHICAGO

To New York Operator EASTMAN, DILLON & Co.

9/26/28

Please leave the following message at the Ambassador Hotel for Mr. George Rea:

“On Monday Bendix requested that I furnish him with full details regarding our situation so that he might consider matter with associates on the way to New York. I refrained from disclosing facts in detail until we had option. Find this morning that he will be in New York at Biltmore Hotel tomorrow sailing for Europe Friday. I am afraid this will delay definite action although his Treasurer Bittner feels this does not make deal impossible. Could leave for New York today on Century if option is in such shape we could talk with Bendix tomorrow.”

G. N. BUFFINGTON

* Identified as Ex. P-393 on depositions herein.

[Defendants'] Exhibit P-395.*

(Received in evidence 11/19/40, R. 985.)

CHICAGO
EASTMAN, DILLON & Co.

To Buffalo office

9/27/28

Please say to Mr. George Rea M & T Bank, Buffalo:

"Can you tell me this morning what portion of company's output has gone to Ford? Borg is interested in knowing what portion of earnings have been derived from this source. Will try to contact Bendix this morning. Would also appreciate receiving recent balance sheet and copy of option. Will wire you later today."

G. N. BUFFINGTON

* Identified as Ex. P-395 on depositions herein.

[Plaintiffs'] Exhibit P-397.*

(Received in evidence 11/18/40, R. 968)

CHICAGO
EASTMAN, DILLON & Co.

To Buffalo office

10/1/28

Please Ask George Rea, Manufacturers & Traders Bank:

"Who is Krauss & Company? Have the holders of 265 shares in any way indicated their willingness to sell at stated price?"

BUFFINGTON

* Identified as Ex. P-397 on depositions herein.

[Defendants'] Exhibit P-109 (first two pages).*
 (Received in evidence 11/26/40, R. 1101)

October 2, 1928.

Mr. J. R. Oishei
 Trico Products Corporation
 624 Ellicott Street
 Buffalo, New York

Dear Mr. Oishei:

ADDENDUM AND SUMMARY TO THE
 HOUDAILLE REPORT HEREWITH

As a further thought and summary of the attached report and the Houdaille patent, my opinion may be expressed as follows:

The Houdaille patent showing the basic features of the combination used in the present day construction of the Houdaille shock absorber expires in February, 1931, a little over two years from the present date. The most important of the subsequent patents is the Schultz patent No. 1,426,115, covering the wing construction of the piston or vane and also the improved form of air leakage valve. This wing or enlarged piston construction is very common in hydraulic or fluid motors, a number of examples of which we have in our files here. The purpose of the wing construction in the hydraulic motor is the same purpose for such construction in the Houdaille device—it is to obtain a more intimate seal between the piston or vane and the casing, and also to add strength to the piston or vane. I think the Schultz patent may be open to serious attack as not embodying invention in this feature but merely the ap-

* Bears exhibit mark in previous litigation, and identified as Ex. P-109 on depositions herein.

plication of mechanical skill and the bringing over of the well-known pistons of this type from the general line of hydraulic devices. The air leakage valve will probably be found in some of the art but I do not believe the analogy between such art and the shock absorber art will be quite so striking as in the case of the piston or vane.

On the whole record, I would say that two years from next February it should be possible to design a satisfactory hydraulic shock absorber using the principles shown in the old Houdaille patent which would satisfactorily perform its job. I think, without question, that at that time considerable competition in this item may be looked for.

Yours very truly,

BAB:AMB

[Defendants'] Exhibit P-403.*

(Received in evidence 11/19/40, R. 985)

CHICAGO

EASTMAN, DILLON & Co.

To Buffalo office

10/3/28

Please tell Mr. George Rea, M. & T. Bank, Buffalo:

"My people here have definitely declined business and I must agree their reasoning is logical. They do large volume with General Motors. As you know practically every independent is using Lovejoy instruments. Should Borg attempt to build up business by taking this volume away from General Motors it would hurt their present relations. Please advise your position so that I may know how to proceed."

G. N. BUFFINGTON

* Identified as Ex. P-403 on depositions herein.

[Defendants'] Exhibit D-49.

(Received in evidence 12/5/40, R. 1683)

THE BUFFALO CLUB
VISITOR'S REGISTER

Date 1928	Name of Visitor	Residence	By Whom Introduced
Oct. 12	R. J. Emmert	Dayton, Ohio)	
" "	E. F. Rossman	Anderson, Ind.)	John R. Oishei
" "	C. E. Wilson	" "	"
" "	A. L. Templin	Pittsburgh	S. K. Colby
" "	Lucien Lacombe	Paris, France	Dean R. Nott
" "	T. P. Schnvily	Trenton, N. J.	Barr
" "	J. E. McCallum	"	"
" "	Capt. R. H. Ranger	Newark, N. Y.	F. A. Ridbury
" 13	R. O. Eastman	Cleveland	O. D. Light
" "	L. D. Bell	"	S. K. Colby
" "	Chas. W. Hall	Buffalo	"
" "	L. D. Blumenstein	"	J. F. VanDeventer
" "	F. R. Huston	N. Y. City	"
" "	C. F. Adams		S. Wallace Dempsey
" 15	C. R. Hayne	N. Y.	A. B. Henin
" "	J. J. Connelly	N. Y.	O. H. Williamson
" 16	John W. Dougherty, Jr.	N. Y. C.	Regis O'Brien
" 17	Paul H. Helms	Beverly Hills, Calif.	Horace Mann
" "	Ralph Riddleberger	New York	Frank C. Trubee, Jr.
" "	Mr. Davis	" "	"
" "	Mr. Wallace		"
" "	Mr. Truber		"
" "	B. S. Stephenson	N. Y. City	Justus Egbert
" "	F. G. Hitchcock	Detroit	A. H. Sharpe
" "	Grant Pierce	New York	R. B. Flershem
" "	W. W. Wetmore		
" "	E. C. Brockett	Buffalo	H. A. Vidal
" "	A. P. Skaer	Buffalo	H. A. Vidal
" "	Harvey Hanks	"	"
" "	E. H. Laphart	"	"
" "	Joseph J. Feist		"

[Defendants'] Exhibit 494c.*

(Received in evidence 12/4/40, R. 1538)

Office Memorandum

Name Houde Engineering
1928

- Oct 17 to conf with Sawyer—minutes & claims of Scully Bros.
26 to services at M & T on transfer of all stock certs to Fred B. Cooley

* Office memorandum in handwriting of Irving L. Fisk. Identified as Ex. P-494c on depositions herein.

[Defendants'] Exhibit 494a.*

(Received in evidence 11/4/40, R. 1538)

Office Memorandum

Name A. B. Shultz
1928

- Oct 19 to conf with you and later at M & T with Wurst & Sawyer
22 to all day on details of sale, all morning at M & T with Falk & Wurst, and confs in PM with you, Harmon & Holliday
23 to confs. with you, Harmon, Wurst and Stanley Falk
24 to most of day at M & T checking figures in AM & with you here & there in PM

* Office memorandum in handwriting of Irving L. Fisk. Identified as Ex. P-494a on depositions.

[Defendants'] Exhibit P-120.*

(Received in evidence 11/27/40, R. 1125)

AGREEMENT, made this 22nd day of October, 1928, between FRED B. COOLEY, representing the New York Car Wheel Company, purchaser under the terms of an option dated September 26th, 1928, of the capital stock of Houde Engineering Corporation, party of the first part, and FRANK P. SCULLY and JAMES N. SCULLY, stockholders of said Houde Engineering Corporation, parties of the second part.

In consideration of the sum of One Dollar (\$1.00) by each party to the other in hand paid, the receipt whereof is hereby acknowledged, and for other good and sufficient considerations, the party of the first part, in addition to the sums agreed to be paid to the stockholders to Houde Engineering Corporation for their stock holdings in the option referred to, will pay the sum of Fifty Thousand Dollars (\$50,000.00) to the parties of the second part on receipt and delivery of the certificates in transferable form representing all the stock holdings of the parties of the second part in said Houde Engineering Corporation, and upon receipt further of a general release executed by each of the parties of the second part to the Houde Engineering Corporation, and all of its stockholders, directors and officers, and such other or further assurances of title and interest covering any claim whatsoever of the parties of the second part against the Houde Engineering Company, its stockholders, officers and directors. De-

* This exhibit is the same as Defendants' Exhibit P-121 except that the latter is signed by F. B. Cooley, Frank P. Scully and James N. Scully and does not contain the legend in the lower left corner signed by A. B. Shultz and reading "I hereby agree to furnish \$50,000 to Mr. Cooley to carry out above contract if entered into by him." Defendants' Exhibit P-120 bears exhibit mark in previous litigation and was identified as Ex. P-120 on depositions herein.

livery of the foregoing certificates and documents to be made not later than Three o'clock P. M., of Tuesday, October 23rd, 1928. James N. Scully, one of the parties of the second part, also agrees immediately to deposit his stock with the Manufacturers & Traders-Peoples Trust Company in transferrable form against their receipt, and immediately to deliver his resignation as an officer and director of the company so that his vacancy may be filled at a meeting to be held on October 22nd, 1928, and said parties of the second part hereby agree to make the delivery and transfer of the documents hereinbefore referred to at the time and in the manner herein provided.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

F. B. COOLEY (SEAL)

I hereby agree to furnish \$50,000. to Mr. Cooley to carry out above contract if entered into by him

A. B. SHULTZ

[Defendants'] Exhibit P-123.*

(Received in evidence 10/30/40, R. 343)

FOR AND IN CONSIDERATION of the payment to the undersigned, FRANK P. SCULLY, of the sums of money described in an option dated the 26th day of September 1928, to Krauss & Company, which option has been assigned to New York Car Wheel Company, which is now the owner and holder of said option, the undersigned does hereby sell, as-

* Identified as Ex. P-123 on depositions herein.

sign, transfer and deliver to New York Car Wheel Company all of his right, title and interest in and to one hundred thirty-one and one-quarter (131¼) shares of the Houde Engineering Corporation, being certificates No. 16 for 50 shares; No. 17 for 50 shares; No. 18 for 31¼ shares. The undersigned hereby authorizes the transfer of said shares on the books of the corporation.

The delivery of these shares is likewise conditional upon the performance by the New York Car Wheel Company of the terms and conditions of an agreement entered into the 22nd day of October, 1928, between Fred B. Cooley, representing New York Car Wheel Company, and Frank P. Scully and James N. Scully, which is made a part hereof.

FRANK P. SCULLY

WITNESS:

JAMES N. SCULLY

[Defendants'] Exhibit P-139.*

(Received in evidence 12/4/40, R. 1546)

October 24th, 1928.

RECEIVED of New York Car Wheel Company, by Fred B. Cooley, the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00), part payment on a total of One Million Eight

* Bears exhibit marks in previous litigation, and identified as Ex. P-139 on depositions herein. This exhibit is the same as Plaintiffs' Exhibit P-542 except that on the latter the notation "O K I. L. Fisk" is omitted and under the signature of Albert B. Shultz appears the following addendum:

"We undertake to see that payments are made to A. B. Shultz, in accordance with the terms of the above receipt, on demand.

MANUFACTURERS & TRADERS-PEOPLES TRUST COMPANY

By PERRY E. WURST,

Executive Vice President."

Hundred Eighty-Four Thousand Ninety-One and 91/100 Dollars, (\$1,884,091.91), which is the full amount due me for One Thousand One Hundred Twenty-Five (1,125) shares of the Capital Stock of Houde Engineering Corporation, sold and delivered under the terms of an option dated September 26th, 1928, given to Krauss & Co., the three percent (3%) commission allotted to the latter having been deducted from the sale price. The balance is to be paid to me on demand, except that I may be permitted to take stock of a new corporation in part payment of the balance.

It is understood that I am repaying to Fred B. Cooley the sum of Fifty Thousand Dollars (\$50,000.00), being the amount paid by him to settle the claim of Francis P. Scully and James N. Scully against me.

ALBERT B. SHULTZ

O K

I. L. FISK

[Plaintiffs'] Exhibit P-74.*

(Received in evidence 11/15/40, R. 950)

Letterhead of
EASTMAN, DILLON & Co.
Chicago, Illinois

October 31, 1928.

Mr. George Rea,
Manufacturers & Traders Peoples Trust Co.,
Buffalo, New York

Dear George:

I delayed writing to you until today thinking that because of your recent negotiations with Bruce, it was proper for

* Identified as P-74 on depositions herein.

him to tell you that Eastman, Dillon & Company considered it unwise to offer publicly the Houde Engineering Company financing at this time.

I regret exceedingly that our decision was delayed, but can assure you that we arrived at this conclusion after a great deal of very careful thought. As I have told you many times, this financing was of a great deal of interest to us, but at the same time I could not bring my associates to feel that we were justified in offering the stock in view of the short earning record and because of unsettled market conditions.

As a result of some earlier negotiations in connection with the option, I find a continuing interest on the part of an individual with whom you may wish to discuss the matter. I, of course, do not know of the negotiations you have on at the present time, but if you are interested I will be glad to put you in touch with my people. I presume that you and Bruce have decided upon an equitable and satisfactory division of the commission derived from the sale of the property.

With kind personal regards, I am

Yours very truly,

GEORGE

GNB:EM

[Plaintiffs'] Exhibit P-75.*

(Received in evidence 11/18/40, R. 975)

Letterhead of

MANUFACTURERS & TRADERS-PEOPLES TRUST COMPANY
Buffalo, New York

* Bears exhibit mark in previous litigation, and identified as P-75 on depositions herein.

November
1st, 1928

Mr. George N. Buffington,
Eastman, Dillon and Company,
Chicago, Illinois.

Dear George:

I am in receipt of your letter today, and was, of course, personally sorry after all the time and effort you, and Bruce, and I, put on this situation together that we did not have the satisfaction of seeing it take concrete public form.

As a matter of fact, everybody here, with the possible exception of myself, was better pleased that no public financing was done, and Mr. Cooley has associated a few individuals with him in the ownership of the property, and he and Mr. Shultz will continue to run it just as planned.

In regard to your reference to an individual who may wish to continue discussing the company, I, of course, don't know who, or what, you have in mind, but everybody is at anytime willing to listen, and if you care to put anybody who is interested in the property in touch with me, I will be very glad to visit with them.

I enjoyed thoroughly working with you on this transaction even though it was not consummated, and hope that we may do something on another one together some day soon.

With kind regards.

Sincerely,

GEORGE

GPR:GW.

[Plaintiffs'] Exhibit P-77.*

(Received in evidence 11/18/40, R. 975)

Letterhead of
EASTMAN, DILLON & Co.
Chicago, Illinois

November 2, 1928

Mr. George P. Rea, Vice-President,
MANUFACTURERS AND TRADERS PEOPLES TRUST CO.,
Buffalo, New York.

Dear George:

I wired you this afternoon telling you of my conversation with Mr. Claire Barnes of the Oakes Products Company. For several reasons which I will not explain to you now, I believe that it may be possible to work out a plan satisfactory to you and Mr. Cooley.

I have suggested to Mr. Barnes that he and his Detroit bankers, who happen to be Harris, Small, get in touch with you, and I understand that both of these gentlemen are very close to Edsel Ford. Mr. Barnes may be out of town next week, but in any event I understand that someone from Harris, Small's office will come to see you.

I will naturally be interested in knowing of any progress which is made.

With kindest regards, I am

Yours very truly,

GEORGE BUFFINGTON

GNB:EM

* Identified as Ex. P-77 on depositions herein.

[Defendants'] Exhibit P-78.*

(Received in evidence 11/19/40, R. 986)

November 2, 1928

Mr. Claire Barnes,
Oakes Products Company,
6201 Woodward Avenue,
Detroit, Michigan.

Dear Mr. Barnes:

As I told you confidentially this morning, Mr. Cooley, President of the New York Car Wheel Company, purchased the Houde Engineering Company for \$4,000,000 plus accrued earnings from August 31 to October 10th. The transaction involved approximately \$4,237,000 plus expenses.

I understand that he has taken into a syndicate a small group which includes one or two of the officers of the Manufacturers and Traders Peoples Trust Company of Buffalo. I do not know all of the details, but understand that at the present time all of the stock of the Houde Engineering Company is tied up in a voting trusteeship which is controlled by three individuals.

We had negotiations with the Company to provide for financing out a part of the purchase price, but for reasons which I told you about this morning, nothing was concluded and so far as I know it is the intention of Mr. Cooley and his associates to operate the business at the present time. I believe that it may be possible to work out a deal whereby Mr. Cooley and his associates would take stock in another Company properly financed for their present holdings in the Houde Company.

* Bears exhibit mark in previous litigation, and identified as Ex. P-78 on depositions herein.

I believe that our interest might best be served if you would give Harris, Small & Company the facts as I have outlined them to you and suggest that they contact with Mr. George P. Rea, Vice-President of the Manufacturers and Traders Peoples Trust Company, with whom we had our negotiations.

As I told you this morning, there are two weaknesses in this situation which we did not like. One is the Ford contract and the other fact, which I would not like to disclose to Mr. Rea, is that the management at the present time is not adequate in our judgment to insure an increasing volume of business. I am sure that it would be unwise in the original instance to disclose any concern on our part about the Ford business as I believe that this is a subsequent step.

In disclosing this information to you, I understand that in the event a deal is consummated Eastman, Dillon & Company, Harris, Small & Company and Paul H. Davis & Company will have an equal interest in the financing.

If there is any other information which you are unable to secure from the people in Buffalo, I would suggest that you get in touch with me.

Yours very truly,

GNB:EM

[Defendants'] Exhibit D-28.*

(Received in evidence 10/30/40, R. 435)

We, the undersigned, Directors of HOUDE ENGINEERING CORPORATION, hereby waive notice of the time and place of a special meeting of the Board of Directors of said Cor-

* Identified as Ex. D-28 on depositions herein.

poration, to be held at the Manufacturers & Traders-Peoples Trust Company, 284 Main Street, in the City of Buffalo, N. Y., on November 7th, 1928, at one o'clock P. M. to consider and act upon the resignation of certain directors and officers, and to elect their successors, and to transact any and all business which may be transacted at a regularly called meeting of the Board of Directors, and we hereby ratify and confirm any and all action which may be taken at such meeting.

Dated, Buffalo, N. Y., November 7th, 1928.

H. L. CHISHOLM

B. D. SHULTZ

A. B. SHULTZ

J. N. SCULLY

G. H. CHISHOLM

Minutes of a meeting of the Board of Directors of HOUBE ENGINEERING CORPORATION, held at the office of the Manufacturers & Traders-People Trust Company, No. 284 Main Street, in the City of Buffalo, N. Y., on the 7th day of November, 1928, at one o'clock P. M., pursuant to a written waiver of the time and place of holding of said meeting, signed by all of the Directors, which waiver appears in the minute book immediately preceding the minutes of this meeting.

There were present the following directors: Messrs. A. B. Shultz, Harry Chisholm and B. D. Shultz.

The meeting was called to order by the President, Mr. A. B. Shultz.

On motion duly made, seconded and unanimously carried, Perry E. Wurst was appointed Acting Secretary of this meeting.

The resignation of Mr. J. N. Scully as Vice President and Director was presented, and on motion duly made, seconded and unanimously carried, the resignation was accepted.

On motion duly made, seconded and unanimously carried, Mr. Fred B. Cooley was elected a Director to succeed Mr. Scully.

Mr. Cooley, being present, immediately accepted the office and took part in the further proceedings of the meeting.

The resignation of Mr. George H. Chisholm as Vice President and Director was presented, and on motion duly made, seconded and unanimously carried, the resignation was accepted.

On motion duly made, seconded and unanimously carried, Mr. L. G. Harriman was elected a Director to succeed Mr. Chisholm.

Mr. Harriman, being present, immediately accepted the office and took part in the further proceedings of the meeting.

The resignation of Mr. Harry Chisholm as Treasurer and Director was presented, and on motion duly made, seconded and unanimously carried, the resignation was accepted.

On motion duly made, seconded and unanimously carried Mr. H. G. Jackson was elected a Director to succeed Mr. Chisholm.

The resignation of Mr. B. D. Shultz as Secretary and Director was presented, and on motion duly made, seconded and unanimously carried, the resignation was accepted.

On motion duly made, seconded and unanimously carried, the following resolution was adopted:

RESOLVED, that the office of Chairman of the Board be created, and that the Chairman of the Board shall be the chief executive officer of the Corporation, and that the By-Laws be amended accordingly.

Mr. F. B. Cooley, as sole stockholder of record of the corporation was present, and assented to such an amendment to the By-Laws.

On motion duly made, seconded and unanimously carried, Mr. F. B. Cooley was elected Chairman of the Board.

On motion duly made, seconded and unanimously carried, Mr. Ralph R. Hull was elected Treasurer of the Corporation.

On motion duly made, seconded and unanimously carried, Mr. L. G. Harriman was elected Secretary of the Corporation.

There being no further business to come before the meeting, it was, on motion duly made, seconded and unanimously carried, adjourned.

PERRY E. WURST,
Acting Secretary.

[Plaintiffs'] Exhibit P-421.*

(Received in evidence 11/18/40, R. 974)

November 10-1928

Mr. George Rea,
Manufacturers & Traders Peoples Trust Co.,
Buffalo, N. Y.

My dear George:

As I wired you day before yesterday, Messrs. Clair Barnes and Allington, both of Detroit, will stop in your office Tuesday morning of next week to discuss the Houde situation.

* Identified as Ex. P-421 on depositions herein.

As I previously told you, I had some negotiations under way with Mr. Barnes at the time you completed sale of the Houde Company to Mr. Cooley and associates. It is my judgment that Mr. Barnes is a very logical purchaser of this company, and while I have no specific suggestions to make to you regarding the meeting next week, I do feel that you should seriously consider the advantages which are apparent to me in working out a deal which would involve Clair Barnes.

They are coming to Buffalo, I believe, with no plans definitely worked out, but I feel confident that they are sufficiently interested in the situation to warrant you and Mr. Cooley giving them a very clear picture of the Houde situation.

As I told you over the telephone last week, the main reason we could not get together on our previous deal was the fact that the syndicate members, with the exception of Eastman, Dillon & Co. were not primarily distributors. This fact, together with Mr. Barnes' position in the automotive industry, in my judgment is important, and while I am not attempting to negotiate this business for you, I wanted to pass these comments on for what they may be worth.

With kind personal regards, I am

Yours very truly,

GNB:S

[Defendants'] Exhibit P-193a.*

(Received in evidence 11/27/40, R. 1164.)

November
14th, 1928.

Mr. A. B. Shultz,
537 East Delavan Ave.,
Buffalo, N. Y.

Dear Sir:

We are pleased to advise you that with the approval of Mr. Cooley you have been allotted a participation to the extent of Two Hundred Fifty Thousand Dollars (\$250,000) in the Syndicate to purchase the entire outstanding capital stock of Houde Engineering Corporation. It is possible, in view of the fact that allotments could not be allowed in full of the amount subscribed, that a new participation agreement will be necessary, and that you will be asked to subscribe to the new agreement for the amount allotted you.

The Syndicate has been formed in the amount of \$4,250,000, which it is believed will somewhat more than cover the amount of the purchase price with accruals. If there is any surplus, this will be used to cover carrying charges.

In the near future you will be asked to forward a payment of 25% on your subscription, plus an additional 5% to cover carrying charges. In the meantime, Mr. Cooley will continue to carry the stock.

Very truly yours,

FRED B. COOLEY

RALPH HOCHSTETTER

LEWIS G. HARRIMAN,

Syndicate Managers.

* Carbon copy of one of letters addressed by Syndicate Managers to Syndicate participants all of which were marked Ex. P-193 on depositions herein. See stipulation in transcript of record, page 1164.

[Defendants'] Exhibit P-85.*
(Received in evidence 11/15/40, R. 954)

November
20th, 1928

Central Trust Company of Illinois,
Chicago, Illinois,

Attention Mr. Alexander:

Gentlemen:

Enclosed herewith we hand you our check for \$15,000, coming out of our remuneration in connection with the sale of Houde Engineering Corporation stock to the New York Car Wheel Company.

As it worked out both the negotiating of the option itself, and the sale of the property were consummated by the Manufacturers & Traders-Peoples Trust Company, but we wish to forward this amount to you in recognition of your continued, courteous, and helpful attitude in connection with this matter.

Yours Very Truly,

Vice President.

GPR:GW

Enc.

* Identified as Ex. P-85 on depositions herein.

[Plaintiffs'] Exhibit P-86.*
(Received in evidence 11/19/40, R. 990)

Letterhead of

MANUFACTURERS & TRADERS—PEOPLES TRUST COMPANY
Buffalo, New York

November
20th, 1928

* Bears exhibit mark in previous litigation, and identified as Ex. P-86 on depositions herein.

Eastman, Dillon and Company,
Chicago, Illinois.

Attention Mr. George Buffington:

Gentlemen:

We are pleased to enclose our check for \$15,000, which we are handing you out of our commission for the sale of the Houde Engineering Corporation stock to the New York Car Wheel Company.

We are doing this not because we feel obligated to do it, but in appreciation of the efforts you made to find a purchaser for this stock, even though, as it worked out, the Manufacturers & Traders-Peoples Trust Company procured the option, and also the purchaser.

With respect to the suggestion which you made that in case of a resale of the stock presently, you feel you are entitled to some further consideration, I beg to say I talked this over with Mr. Harriman, and other members of the purchasing syndicate, and they feel that in view of the fact that there was no intention to resell the stock, as they intended to operate the company for sometime, that when a prospective purchaser appeared it was made clear to them that the price quoted them was net, and did not involve payment of any commissions, or other fees to anyone, that they cannot consider any question of a division of any part of the profit.

I trust you will feel that we have been generous in connection with the matter.

Yours very truly,

GEORGE P. REA
Vice President.

GPR:GW
11-a—WOOD
Enc.

[Defendants'] Exhibit D-41.*
(Received in evidence 10/31/40, R. 492)

December
5th, 1928.

Mr. A. B. Shultz,
557 East Delavan Ave.,
Buffalo, N. Y.

Dear Sir:

The Syndicate organized for the purpose of purchasing from Fred B. Cooley the outstanding stock of Houde Engineering Corporation, in which you were allotted a participation to the amount of \$250,000, has been closed.

No payment was called on your participation for the reason that Mr. Cooley did not require immediate payment, and the stock has now been sold for the sum of \$6,000,000 in cash.

The cost of the stock was \$4,000,000, plus accrued earnings from August 31st to the date the option was exercised, amounting to \$210,611.02, making the total cost, \$4,210,611.02. To this sum is added interest charges, auditors' fees, attorney fees and other expenses, amounting to \$45,561.43, making the cost plus carrying charges and expenses the sum of \$4,256,972.45. Deducting this amount from the sale price leaves a profit of \$1,744,027.55.

By the terms of the underwriting agreement Mr. Cooley receives 25% of this sum which amounts to \$436,006.88, leaving a net profit to the Syndicate of \$1,308,020.67, or 30.7769589 per cent of \$4,250,000, the total amount of the purchase syndicate.

* Carbon copy of one of letters addressed by Syndicate Managers to Syndicate participants all of which were marked Ex. P-194 on depositions herein. See stipulation in transcript of record, page 492.

Your portion is the sum of \$76,942.39, for which amount the Syndicate Managers' check is enclosed herewith.

Very truly yours,

FRED B. COOLEY,
L. G. HARRIMAN
RALPH HOCHSTETTER,
Syndicate Managers.

[Defendants'] Exhibit D-36.*

(Received in evidence 10/31/40, R. 1592)

COPY

Letterhead of
HARRIS, SMALL & Co.
Detroit

The original of this letter (with enclosures other than securities) is being mailed under separate cover. Please verify all securities, and if found correct, sign and return this copy as a receipt. No other acknowledgment is necessary.

December 5, 1928

Mr. A. B. Schultz,
c/o Houdaille Corporation,
Buffalo, N. Y.

Dear Sir:

We are forwarding you today through the Manufacturers and Traders Peoples Trust Company—

1,000 UNITS HOUDAILLE CORPORATION STOCK
with draft attached for \$66,000.00.

* See stipulation in transcript of record, pages 436, 2193.

Kindly honor the draft upon presentation.

Yours very truly,

HARRIS, SMALL & Co.

By

Cashier.

FJO:JM

Received from Harris, Small & Co., Detroit, the securities described and enumerated above.

Date Dec. 5, 1928.

A. B. SHULTZ
signature

[Defendants'] Exhibit D-33.

(Received in evidence 10/31/40, R. 418)

SUPREME COURT—ERIE COUNTY

BYRON D. SCHULTZ,

Plaintiff,

vs.

MANUFACTURERS & TRADERS TRUST
COMPANY,

Defendant.

For cause of action herein, this plaintiff, by Albrecht, Maguire & Mills, his attorneys, alleges upon information and belief:

FIRST: That the defendant is and was, at all of the times hereinafter mentioned, a domestic corporation duly incorporated under the laws of the State of New York; and now is and at all times hereinafter mentioned, was engaged in banking business in the City of Buffalo, New York.

SECOND: That, on September 26th, 1928, this plaintiff was the owner of two hundred eighty one and one-fourth ($281\frac{1}{4}$) shares of the capital stock of Houde Engineering Corporation, a New York State Corporation.

THIRD: That, on said September 26th, 1928, this plaintiff and other stockholders representing substantially all of the capital stock of said Houde Engineering Corporation issued and outstanding, entered into an agreement with the defendant through Krauss & Company, its duly authorized agent and representative, whereby this plaintiff and said other stockholders gave to the defendant, through said Krauss & Company, the right to sell within thirty days from the date thereof, all of the stock of said Houde Engineering Corporation, for the sum of Four Million Dollars, (\$4,000,000.00), plus any accrual in net assets of said Houde Engineering Corporation after August 31st, 1928, and the defendant through its agent and representative, agreed to act as broker for this plaintiff and said other stockholders in said transaction and, in the event of a sale of said stock being consummated, this plaintiff and said other stockholders agreed to pay a commission of three per cent (3%) upon the selling price thereof.

FOURTH: That, in order to induce the plaintiff and said other stockholders to enter into said option and brokerage agreement, the defendant represented to and agreed with this plaintiff and said other stockholders that the said selling price of Four Million Dollars (\$4,000,000.00) plus accrued earnings, would be the minimum price at which the defendant, as broker, would endeavor to sell the said stock, and the defendant further promised that it would, if possible, negotiate a sale of the said stock for plaintiff and his fellow stockholders at a better and higher price than the minimum therein set out.

FIFTH: That, thereafter and between said September 26th, 1928, and October 11th, 1928, the General Motors Corporation made an offer to defendant to purchase the said stock at a sum in excess of the price set forth in said option and brokerage agreement, but, in violation of its promises and agreements aforesaid, and in further violation of its duty as broker for the plaintiff, the defendant did not accept such offer, nor did it inform this plaintiff of said offer or of said better price, but concealed said offer and the fact that it had been made from this plaintiff.

SIXTH: That, on October 11, 1928, this defendant, through Lewis G. Harriman, its President, and Perry E. Wurst, and George P. Rea, two of its Vice-Presidents, entered into an agreement with one Fred B. Cooley, President of the New York Car Wheel Company, in writing, which recited that New York Car Wheel Company was to become the purchaser of said stock, and thereupon agreed that a Syndicate should be formed, with the assistance of the officials of the defendant, to take over from the New York Car Wheel Company Three Million Five Hundred Thousand Dollars (\$3,500,000.00) of the total purchase price of Four Million Dollars (\$4,000,000.00) but that, in the event of the death or disability of said Cooley before the organization of said Syndicate, said Messrs. Harriman, Wurst and Rea would hold the said New York Car Wheel Company harmless from all its obligations to complete the purchase of the Houde Engineering Corporation stock, and in such event Messrs. Harriman, Wurst and Rea should succeed to all the rights of said New York Car Wheel Company to purchase said stock.

SEVENTH: That, on the same day, viz.: October 11, 1928, the defendant, through its said agent, advised this plaintiff and said other stockholders, in writing, that the New York Car Wheel Company of Buffalo had agreed to purchase the said stock upon the terms of the said brokerage agreement

and had made available in the hands of the defendant the sum of Four Million Dollars (\$4,000,000) therefor and called upon the plaintiff and said stockholders for the delivery of the said stock prior to October 25, 1928.

EIGHTH: That the defendant, in violation of its trust, failed and neglected to inform and advise this plaintiff that it had an interest in the purchase of the said stock and that it had agreed to become a purchaser of all or of part of the said stock and this plaintiff was led by the defendant to believe and did believe, that the said New York Car Wheel Company was purchasing the same wholly for its own account and in its own interest.

NINTH: That plaintiff, believing that the New York Car Wheel Company was the purchaser of said stock and unaware that the defendant was making a secret and undisclosed profit on said sale delivered to the defendant Two Hundred Eighty One and One Fourth ($281\frac{1}{4}$) shares of said stock and received therefor the sum of Four Hundred Eighty Five Thousand, Five Hundred Ninety Dollars and Seventy One Cents (\$485,590.71) and no more.

TENTH: That as plaintiff is now informed and verily believes, all of the foregoing were parts of and were in furtherance of a plan and scheme by this defendant wrongfully and secretly to make a secret and undisclosed profit out of the said transaction; and in further pursuance of said plan, this defendant did thereafter form a Syndicate in which the defendant allotted participations to itself, to a subsidiary, and to certain of its executive officers, directors and to others, and through and by means of which Syndicate, without any of the members or participants being called upon to contribute any funds whatever, this defendant did thereafter sell all of said stock for the sum of Six Million Dollars (\$6,000,000.00) and, in addition, this defendant collected from this plaintiff and said stockholders the sum of One Hundred Twenty Six Thousand Three Hun-

dred Eighteen Dollars and Thirty Three Cents (\$126,318.33) as its commission as broker for the plaintiff and his fellow stockholders in the sale of said stock, and the plaintiff paid to the defendant, on account of said commission, the sum of Fourteen Thousand Five Hundred Sixty Seven Dollars and Seventy-One Cents (\$14,567.71).

ELEVENTH: That in addition to the commission of Fourteen Thousand Five Hundred Sixty Seven Dollars and seventy-one cents (\$14,567.71), the defendant made a concealed and secret profit on the sale of plaintiff's stock in the sum of Two Hundred Six Thousand Three Hundred Sixty-two Dollars and twelve cents (\$206,362.12).

TWELFTH: That this plaintiff relied upon the statements of the defendant made to him as aforesaid and believed them and believed that the defendant was in good faith representing only the interests of this plaintiff and his fellow stockholders in said transaction, and was unaware of the facts as hereinbefore alleged until long after the delivery of the said stock and has only recently learned of the facts as herein set forth.

THIRTEENTH: That by reason of the premises aforesaid plaintiff has been damaged in the sum of Two Hundred Twenty Thousand Nine Hundred Twenty Nine Dollars and eighty three cents (\$220,929.83).

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Two Hundred Twenty Thousand, Nine Hundred Twenty Nine Dollars and eighty three cents (\$220,929.83) with interest thereon from the 24th day of October, 1928, together with the costs and disbursements of this action.

ALBRECHT, MAGUIRE & MILLS
Attorneys for Plaintiff
 Office & P. O. Address
 1300 Genesee Building,
 Buffalo, New York

STATE OF NEW YORK	}	ss. :
COUNTY OF ERIE		
CITY OF BUFFALO		

BYRON D. SCHULTZ, being duly sworn deposes and says that he is the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

BYRON D. SCHULTZ

Sworn to before me this
2nd day of November, 1934.
PEARL L. CANDEE
Notary Public, Erie County, N. Y.



OCT 6 1942

CHARLES ELMORE COOLEY
CLERK

22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942—No. 404.

CONSOLIDATED CAUSES.

WYATT D. SHULTZ and CAROLYN SHULTZ, as Co-Executors under the
Last Will of ALBERT B. SHULTZ, deceased,

Petitioners,

against

MANUFACTURERS & TRADERS TRUST COMPANY, Individually and as
Co-Executor under the Last Will of ALBERT B. SHULTZ, deceased,
PERRY E. WURST, LEWIS G. HARRIMAN, FREDERICK B. COOLEY,
GEORGE H. CHISHOLM, HARRY L. CHISHOLM, RALPH HOCHSTETTER,
ANSLEY W. SAWYER;

and

THOMAS C. EASTMAN, HERBERT L. DILLON, HENRY L. BOGERT, JR.,
GILMER SILER, Individually as well as Co-Partners with JAMES P.
MAGILL and MAURICE H. BENT, doing business under the firm name
and style of Eastman, Dillon & Company,

Respondents.

WYATT D. SHULTZ and CAROLYN SHULTZ, as Co-Executors under the
Last Will of ALBERT B. SHULTZ, deceased,

Petitioners,

against

MANUFACTURERS & TRADERS TRUST COMPANY, as Co-Executor under
the Last Will of ALBERT B. SHULTZ, deceased, THOMAS CANTWELL
and GEORGE P. REA,

Respondents.

BRIEF OF RESPONDENTS, THOMAS C. EASTMAN, *ET AL.* (EASTMAN, DILLON & CO.), IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

JOHN W. DRYE, JR.,

Counsel for Respondents,

Thomas C. Eastman, et al.

FRANCIS S. BENSEL,

W. FREDERICK KNECHT,

of Counsel.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942—No. 404.

WYATT D. SHULTZ and CAROLYN SHULTZ, as Co-Executors under the Last Will of ALBERT B. SHULTZ, deceased,

Petitioners,

against

MANUFACTURERS & TRADERS TRUST COMPANY, Individually and as Co-Executor under the Last Will of ALBERT B. SHULTZ, deceased, PERRY E. WURST, LEWIS G. HARRIMAN, FREDERICK B. COOLEY, GEORGE H. CHISHOLM, HARRY L. CHISHOLM, RALPH HOCHSTETTER, ANSLEY W. SAWYER;

and

THOMAS C. EASTMAN, HERBERT L. DILLON, HENRY L. BOGERT, JR., GILMER SILER, Individually as well as Co-Partners with JAMES P. MAGILL and MAURICE H. BENT, doing business under the firm name and style of Eastman, Dillon & Company, Respondents.

CONSOLIDATED
CAUSES.

WYATT D. SHULTZ and CAROLYN SHULTZ, as Co-Executors under the Last Will of ALBERT B. SHULTZ, deceased,

Petitioners,

against

MANUFACTURERS & TRADERS TRUST COMPANY, as Co-Executor under the Last Will of ALBERT B. SHULTZ, deceased, THOMAS CANTWELL and GEORGE P. REA,

Respondents.

BRIEF OF RESPONDENTS, THOMAS C. EASTMAN, ET AL. (EASTMAN, DILLON & CO.), IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

Petitioners' summary statement of the case (petition, pp. 4-29) is inadequate and misleading. It virtually ignores

the findings of fact made by the District Court (R. 202-45), and it does not accurately describe the position occupied by the respondents, Thomas C. Eastman, *et al.*, in respect to the transactions in controversy. A brief statement of the facts involved is, therefore, necessary to a proper determination of the petition.

Statement of the Case.

The respondents Thomas C. Eastman, *et al.* are parties only to the first of these two consolidated actions. In 1928, which is the time of the transactions complained of, said respondents were engaged as co-partners in the investment banking business under the firm name and style of Eastman, Dillon & Co. (hereinafter referred to as "Eastman Dillon") with offices, among other places, in New York City and Chicago (R. 149-50, 158, 204). The respondent Maurice H. Bent was the resident partner in charge of Eastman Dillon's Chicago office and George N. Buffington, an employee (named but not appearing as a defendant), was the head of its new business department (R. 149-50, 158, 204).

The Evidence.

Eastman Dillon first came into contact with Houde Engineering Corporation (hereinafter referred to as "Houde") in the early part of January, 1928. At that time, Cortelyou,⁽¹⁾ the then Secretary of Central Trust

⁽¹⁾ Although Cortelyou was originally named and appeared as a party defendant, petitioners abandoned their charges against him on their appeal to the Circuit Court of Appeals (R. 2-3, 248).

Company of Illinois, after first obtaining the consent of the decedent and other parties in interest, approached Buffington of Eastman Dillon and through him invited that firm to join with Manufacturers & Traders Trust Company (hereinafter referred to as "the Bank") and Central Trust Company in a survey or investigation which was then being conducted of Houde's operations (R. 207, 923-4, 926, 930, Ex. P-441). The purpose of this survey was to analyze the respective advantages and disadvantages of a recent influx of new business which Houde was receiving from the Ford Motor Company and to determine whether a refinancing of Houde was feasible⁽²⁾ (R. 206, 922, 1090-1, 1095-6, 1227). Cortelyou testified that Eastman Dillon was asked to explore the possibilities of some form of public financing for Houde because neither the Bank nor Central Trust Company had participated to any extent in the public offering of stocks, and for the reason that Eastman Dillon was actively engaged in that line of business and was familiar with the automobile accessories field (R. 923-4). He also testified that Buffington, when first approached, was

⁽²⁾ Prior to the commencement of the survey, namely, during the years 1925, 1926, and 1927, the earnings of Houde had shown a steady decline (R. 206, 1088-9, Exs. P-21, P-22). At the same time, Houde also suffered from a chronic lack of working capital (R. 615, 1085, 1306), with the result that numerous efforts were made by the owners, including decedent, either to sell or to refinance the company (R. 206, 707-8, 710-5, 730-2, 1002, 1043-4, 1306-7, 1310-1, Exs. P-27, P-31, P-33). The advent of the new Ford business in the Fall of 1927, accordingly, found Houde poorly equipped in the way of working capital to effect the rapid expansion of its plant and production facilities made necessary by such business (R. 206, 1308-9). It was in the light of this situation that the owners of Houde requested the Bank, as the company's commercial banking connection (R. 205, 1084), to make the survey in question. Since it was anticipated that new capital would be required, the Bank enlisted the aid of Central Trust Company, which had participated in the previous efforts of the owners to sell the company (R. 207, 1085-6, 1090-1, 1383-4).

not particularly interested and that it was only after several calls that Buffington finally consented to look into the matter (R. 924).

The survey was completed early in February, 1928, and a proposed plan of refinancing for Houde was subsequently formulated and set up (R. 207, 785-6, 795-6, 842, 925-7, Exs. P-20, P-454). This proposal was submitted to the decedent and other Houde stockholders but was rejected by them for the reason that they preferred, for the time being at least, to assume the risk of financing Houde's production costs through the medium of bank loans, rather than to resort to public financing (R. 207, 927, 934-5, Ex. P-448).

Thereafter, both Eastman Dillon and Central Trust Company maintained a continuing interest in the Houde situation (R. 207, 927-8) and Buffington exchanged information with Cortelyou and kept himself informed generally as to the status of the matter (R. 624-5, 939, 1385, 2044-5, Exs. P-375-P-382). By July, 1928, it became apparent that no public financing would be undertaken by Houde and the matter, so far as Eastman Dillon was concerned, was dropped.

Having learned during the course of the investigation in February, 1928, of the desire of the Houde owners, including decedent, to dispose of their stock at a satisfactory price, Buffington, in the latter part of July, 1928, approached Mr. Fred Glover, President of the Timken-Detroit Axle Company, in an endeavor to interest him in purchasing the Houde business (R. 207, 925, Exs. P-54, P-55, P-441). He later made similar efforts to interest the Bendix Company and Borg-Warner Company, both of which concerns, like the Timken-Detroit Axle Company, were engaged in the automobile accessory business and logical buyers of Houde (R. 207, 2075, 2091-2, 2094, Exs. P-392, P-395). These negotia-

tions were undertaken by Buffington in the hope that if a purchaser of the Houde business could be found, such purchaser might wish to finance out all or part of the purchase price through the medium of some stock offering in which Eastman Dillon might be permitted to participate (R. 2060).

Buffington was unable to elicit any real interest on the part of his prospects without being able to give them a definite price at which Houde could be bought. He accordingly communicated with Rea and suggested that an option or definite price be secured from the Houde stockholders (R. 208). In this connection, Buffington testified (R. 2059-60):

“Q. Now Mr. Buffington, did you suggest that the M. & T. Bank obtain an option from the stockholders of the Houde Engineering Corporation? A. I believe I did.

Q. And when did you make that suggestion, sir? A. It was about the time that it looked as though I might interest Mr. Glover of the Timken-Detroit Axle Company of Detroit in purchasing the business.

Q. And did you have discussions along these lines with Mr. Glover? * * * A. I believe that in my discussions with Mr. Glover, he wanted to know a definite price at which he could purchase the business, if he was interested, for a given period of time, and it was with that in mind, my best recollection is, that I asked Mr. Rea that he secure an option.

Q. And did you also discuss with Mr. Glover the financing out of all or any of the purchase price of the Houde stock? A. My best recollection is that I did, because that would be the reason our company was interested in the sale, because our business was that of distributing securities.”

The above testimony of Buffington is fully corroborated by that of Rea (R. 1386-8, 1474-5) and is also confirmed by

the contemporaneous correspondence^(a) (Exs. P-56, P-57, P-59).

Acting on Buffington's suggestion, Rea, in August, 1928, entered upon a series of discussions with decedent in an endeavor to obtain an option or a definite price at which he and his fellow stockholders would be willing to sell their stock. However, these discussions came to naught by rea-

^(a) Under date of July 27, 1928, Buffington wrote Rea, stating (Ex. P-56) :

"I expect to talk to my people in Detroit on the telephone tomorrow, to see if it will be possible to arrange a meeting in Buffalo the early part of next week. I can assure you that this is more than a passing interest with my friend but I, of course, do not know how far he would go with Mr. Schultz, if he is projecting his ideas of price entirely on the last three months earnings. However, I am convinced that this is a situation which warrants further discussion by the principals."

Rea, in reply, wrote on August 13, 1928, in part, as follows (Ex. P-57) :

"Have had a preliminary conversation this morning with Mr. Schultz and find that his attitude is, in general, as I reported it to you. I do not think there is any question but what a cash offer of a price that seems reasonable to him could purchase the business in that manner."

And again on August 31, 1928, Buffington wrote another letter to Rea, saying (Ex. P-59) :

"Following my telephone conversation with you a week ago Friday, I talked with Mr. Glover again, and he seems quite anxious to have certain information which I have been unable to give him, regarding the Houde Engineering Company.

"As I told you when I originally talked to you, they have one or two other plans in mind on which they are working, and Mr. Glover intimated to me that one situation had progressed to the point where they would have to make a decision in the near future. I appreciate fully the way you have handled the matter to this point and realize the wisdom in not appearing anxious with Mr. Schultz, *but I do believe that if possible we should be in a position to discuss something quite definite with Mr. Glover within the next week or ten days, if we expect him to become actively interested in acquiring the business.*" (Italics ours.)

son of decedent's unexpected departure for Europe on September 6, 1928 and his refusal, prior to that time, to discuss a definite price because of the absence of the respondent G. H. Chisholm (Exs. P-57-P-62).

Upon the return of Chisholm to Buffalo later in September, negotiations were carried on first between Rea and Chisholm and later between Rea, Chisholm and two other Houde stockholders, namely, B. D. Shultz, the decedent's brother, and James Scully, which culminated in the execution of the option agreement, Exhibit P-98, on September 26, 1928 (R. 208-10). The facts in connection with these negotiations are fully set forth in the brief of the other respondents and need not be reiterated here. Suffice it to say that, contrary to the allegations of the complaint, Eastman Dillon did not participate in these negotiations and made no representations whatever. This was affirmatively found as a fact by the District Court (R. 211), and the finding is supported by the testimony of James Scully and B. D. Shultz (R. 329, 356), as well as that of Rea and G. H. Chisholm (R. 734, 1311-2, 1431).

Upon being informed by Rea that the Houde stockholders had evidenced their willingness to sell their stock at a price of \$4,000,000, plus accruals, Buffington continued in his efforts to interest Borg-Warner, Bendix and the Timken-Detroit Axle Company in the purchase of the business (R. 213, 1392, Exs. P-393, P-395, P-398, P-399). By October 3, 1928, however, all three of these companies had indicated their definite disinterest in the matter (R. 213, 1099, 1393, 1476-7), and Buffington so advised Rea (Ex. P-403).

The subsequent negotiations which were initiated by Rea, Harriman and Wurst on the part of the Bank, and which resulted in the sale of the Houde stock to Mr. Fred

B. Cooley, were carried on by them independently of Eastman Dillon and Buffington. The efforts to interest Cooley came about by reason of and after the receipt by Rea of Buffington's wire of October 3, 1928, advising that his people had "definitely declined business" (R. 1397, Ex. P-403).

Eastman Dillon took no part whatever in the negotiations with Cooley or the transactions by which the sale of the Houde stock was ultimately consummated (R. 213, 216, 1434, 2147). Eastman Dillon did not learn of the Cooley purchase until October 15, 1928, some four or five days after Cooley had agreed to buy the stock and the option had been exercised (R. 216-7, 2093, Exs. P-402, P-404), and, unlike the decedent, it was at no time informed or aware that Cooley was a director of the Bank (R. 237, 2152) and that his purchase was financed by the Bank (R. 216, 227, 2151). It likewise was without any knowledge of, and had no connection with, the negotiations conducted by and on behalf of Cooley on October 12, 1928 with the representatives of the General Motors Corporation (R. 218-9).

Following Cooley's purchase of Houde, consideration was given by him to the possibility of arranging some form of public financing (R. 222, 1122-3). Efforts were accordingly made by Rea to revive the interest of Buffington, with the result that numerous discussions ensued in which Central Trust Company, through Cortelyou, also participated (R. 222, 688, 951-2, 2147). While various plans for financing were considered (R. 222, 786-7, 853, 1164), they never proceeded beyond the discussion stage (R. 2147). By October 31, 1928, Eastman Dillon had decided that any financing of Houde was at that time unwise, and flatly and finally

declined to go forward therewith (R. 228, 949-50, Ex. P-74).⁽⁴⁾

The syndicate which was thereafter formed by Cooley to acquire the Houde stock (R. 228, 1151, 1155, 1412-3, 1953) was in no way participated in by Eastman Dillon and it at no time shared or had any interest, direct or indirect, in the profits ultimately realized therefrom by the syndicate members (R. 230).

Sometime towards the middle of October, 1928, Buffington, through a mutual acquaintance, had met a Mr. Claire Barnes, who was the then head of the Oakes Products Corporation and who had, shortly prior thereto, consummated a successful public offering of stock of the Hershey Corporation through the investment banking firms of Harris, Small & Co. and Paul H. Davis & Co. (R. 235, 2063-5, 2079, 2081-2, 2164). In the latter part of October, 1928, Barnes, as a result of this earlier contact with Buffington, indicated an interest in Houde. Buffington accordingly communicated this fact to Rea in his letter of October 31st (without, however, mentioning Barnes' name) (Ex. P-74), and, upon learning from Rea of the willingness of the then owners of the Houde stock to discuss a sale (Ex. P-75), wrote Barnes on November 2, 1928, in part, as follows (Ex. P-78):

⁽⁴⁾ Buffington communicated this information to Rea by letter of October 31, 1928, reading, in part, as follows (Ex. P-74):

"I delayed writing you until today, thinking that because of your recent negotiations with Bruce (Cortelyou) it was proper for him to tell you that Eastman Dillon & Company considered it unwise to offer publicly the Houde Engineering Company financing at this time.

"I regret exceedingly that our decision was delayed, but can assure you that we arrived at this conclusion after a great deal of very careful thought. As I told you many times, this financing was of a great deal of interest to us, but at the same time I could not bring my associates to feel that we were justified in offering the stock in view of the short earning record and because of unsettled market conditions."

"We had negotiations with the Company to provide for financing out a part of the purchase price, but for reasons which I told you about this morning, nothing was concluded and so far as I know it is the intention of Mr. Cooley and his associates to operate the business at the present time. I believe that it may be possible to work out a deal whereby Mr. Cooley and his associates would take stock in another Company properly financed for their present holdings in the Houde Company.

"I believe that our interest might best be served if you would give Harris, Small & Company the facts as I have outlined them to you and suggest that they contact with Mr. George P. Rea, Vice-President of the Manufacturers and Traders Peoples Trust Company, with whom we had our negotiations.

"As I told you this morning, there are two weaknesses in this situation which we did not like. One is the Ford contract and the other fact, which I would not like to disclose to Mr. Rea, is that the management at the present time is not adequate in our judgment to insure an increasing volume of business. I am sure that it would be unwise in the original instance to disclose any concern on our part about the Ford business as I believe that this is a subsequent step.

"In disclosing this information to you, I understand that in the event a deal is consummated Eastman, Dillon & Company, Harris, Small & Company and Paul H. Davis & Company will have an equal interest in the financing. * * *"

On the same day, to wit, November 2, 1928, Buffington for the first time apprised Rea of Barnes' name and identity (R. 234-5, 593, 670, 1122, 1491-3, 2083, Exs. P-77, P-437), and later made arrangements for Barnes and his associ-

ate, Allington, a partner in the firm of Harris, Small & Co., to come to Buffalo for the purpose of looking into the Houde situation with a view to a possible purchase of the Houde stock (R. 235, 2114-5, 2146, Exs. P-419, P-420, P-421, P-422).

On November 14, 1928, Barnes and Allington arrived in Buffalo and discussed the matter with Rea (R. 233, 673, 676-7). They left that night for Chicago, but before doing so, telephoned Melville C. Mason, their Detroit counsel, and instructed him to form a new corporation for the purpose of acquiring the Houde stock, if and when the same should be purchased by Barnes or his bankers, Harris, Small & Co. (R. 235-6, 1607, 1609, 1616). The next day Barnes and Allington arrived in Chicago where they met with Buffington and Mr. Davis of Paul H. Davis & Co. and discussed the matter of the purchase of the Houde stock and the prospective capitalization and financial structure of the proposed new company which was being formed by Mason (R. 1616, 2078-9, 2080-1, 2118, 2122, 2123, 2149, 2151). As a result of this conference, it was understood that, in the event Barnes consummated a purchase of the Houde stock, Eastman Dillon, Harris Small & Co. and Paul H. Davis & Co. would participate equally in any public financing (R. 2118, 2125). Prior to this meeting of November 15th, Buffington did not know that Barnes was going to purchase the Houde stock (R. 235, 2146-7) and had not discussed the matter with any representative either of Harris, Small & Co. or of Paul H. Davis & Co. (R. 242, 2079).

On November 20, 1928, Barnes and Allington returned to Buffalo, accompanied by one of their lawyers and Herbert Markham of Paul H. Davis & Co. (R. 236, 1415, 2168). As a result of this visit, an agreement, dated that day, was entered into pursuant to which Harris, Small & Co. purchased all of the Houde stock from the Cooley syndicate

for the sum of \$6,000,000 (Amended Complaint, Ex. B, R. 37-42, 236, 1165-6, 1958-9).

By the time of the aforesaid sale to Harris, Small & Co., Mason, acting upon the prior instructions of Barnes, had caused a corporation, known as the Houdaille Corporation, to be incorporated under the laws of Michigan (R. 204, 236, 1614-5, Ex. P-565). At Barnes' request Mason had also caused to be filed the necessary applications to list the stock of the Houdaille Corporation on the Chicago Stock Exchange and to obtain the approval of the Michigan Securities Commission for the sale of said stock in Michigan. Accordingly, when the sale of the Houde stock was consummated, Harris, Small & Co., pursuant to an agreement with the Houdaille Corporation, transferred and assigned to it all the Houde stock, together with the sum of \$480,000, in consideration of which said Houdaille Corporation issued 108,000 shares of its Class A No Par Value Convertible Preference Stock and 148,000 shares of its Class B No Par Value Stock (R. 204-5, Exs. P-427 A-D).

On November 20, 1928, and after the Cooley syndicate had committed itself to deliver the Houde stock, Eastman Dillon entered into an agreement in writing with Harris, Small & Co., whereby it agreed to purchase 36,000 units, consisting of 36,000 shares of Class A and Class B stock of the Houdaille Corporation, being one-third of the stock to be offered to the public, and 10,000 shares of said corporation's Class B stock for the sum of \$2,160,000 (R. 242-3, Ex. P-426). Thereafter and upon the issuance of the Houdaille Corporation stock, Eastman Dillon took up and paid for the stock called for in its commitment to Harris, Small & Co. and disposed of it to its customers (R. 241, 242, 2082, 2122, Ex. P-449).

On November 20, 1928, Eastman Dillon and Central Trust Company both received the sum of \$15,000 from the Bank by separate checks (Exs. P-186, P-187). In transmitting Eastman Dillon's check, the Bank under date of November 20, 1928, wrote, in part, as follows (Ex. P-86):

"We are pleased to enclose our check for \$15,000, which we are handing you out of our commission for the sale of the Houde Engineering Corporation stock to the New York Car Wheel Company.

"We are doing this not because we feel obligated to do it, but in appreciation of the efforts you made to find a purchaser for this stock, even though, as it worked out, the Manufacturers & Traders-Peoples Trust Company procured the option, and also the purchaser. * * *

"I trust you will feel that we have been generous in connection with the matter."

A letter of similar tenor was written to Central Trust Company (Ex. P-85).

While the letter of transmittal, quoted above, states that the \$15,000 remittance was being made "out of our commission", the fact is that the payment was actually made out of the Bank's individual funds since the latter did not receive payment of its commission until December 5, 1928 (R. 1020-1, 1170-1, Exs. P-1, P-166). The evidence, moreover, establishes that said payment was not considered by the parties as a division, equitable or otherwise, of the Bank's commission but was intended, instead, as a voluntary gift on the part of the Bank in recognition of Eastman Dillon's efforts to secure a purchaser for the Houde stock (R. 950, 1418-9, 1420, 2079, 2140-1). It was the then prevailing custom and practice in the investment banking business to make a payment of the kind in question under the

circumstances presented, and it was because of this custom, and for this reason only, that the \$15,000 check was sent to Eastman Dillon (R. 237, 1421). The claim made in the petition that Eastman Dillon had demanded payment of this sum and had sought in addition a share of the Bank's syndicate profits (petition, pp. 22, 23) is without foundation and is contradicted by the evidence (R. 950-1, 1418-9, 2079-80).

The Decisions Below.

Upon all of the evidence, including that pertaining to Eastman Dillon as summarized above, the District Court in a well reasoned opinion concluded that petitioners had failed to establish any cause of action against the respondents (R. 177-202, 40 F. Supp. 675). More particularly, the Court held (1) that the agreement of September 26, 1928, Exhibit P-98, constituted an option and that no fiduciary relationship existed between the Bank and the decedent, (2) that even if the Bank should be assumed to have been the agent of decedent, neither the Bank nor any of its correspondents breached any duty owed to the decedent and were not guilty of any fraud or conspiracy to defraud the decedent, and (3) that any possible cause of action which petitioners might possess was long barred by the statute of limitations. The District Court later supported the determination announced in its opinion by complete and extensive Findings of Fact and Conclusions of Law (R. 202-45), upon the basis of which it duly rendered judgment dismissing the complaints on the merits as to all the respondents (R. 246-7).

Upon appeal by petitioners, the Circuit Court of Appeals, Second Circuit, unanimously affirmed the judgment of the District Court by judgment of affirmance entered on July 6, 1942 (R. 2348). A majority and concurring opinion

were rendered by the Court (R. 2323-2347, 128F. (2d) 889). The majority opinion, written by Judge Clark and joined in by Judge Swan, noted that "After a lengthy trial on the merits the district court rendered a decision finding against the plaintiffs on all points, both of fact and of law" (R. 2325) and that "the writer * * * is of the view that the facts found by the court were supported by the evidence which appears of record, and that from these facts as found the conclusions of the court followed" (R. 2325). Although Judge Frank, in his concurring opinion, disagreed with Judge Clark's acceptance of the findings of the District Court to the extent that said findings related to certain of the acts on the part of the Bank and its officers, he in no way attempted to disturb or impeach the findings made in respect of the other respondents, including Eastman Dillon (R. 2337-47).

While it appears that the majority opinion all but expressly approved the action of the District Court in dismissing the complaints on the merits, and that Judge Frank's views to the contrary were expressly limited by him to the Bank and its officers, the Court as a whole seemingly predicated its affirmance principally on the defense of the statute of limitations (R. 2325). In this connection, the Court ruled that the action was subject to the six-year statutory period of limitation prescribed by Section 48 of the New York Civil Practice Act and that any cause of action of petitioners was accordingly barred.

Summary of Argument.

The issues which petitioners here seek to have reviewed pertain exclusively to the question of the statute of limitations. However, since any issue as to the applicability of the statute of limitations necessarily presupposes the existence of a meritorious cause of action, this Court, unless it is to pass upon a purely hypothetical question, must be satis-

fied that petitioners possess and have established a valid cause of action against respondents.

Inasmuch as the District Court has held, upon the basis of findings which were in no way disturbed by the Circuit Court of Appeals, that petitioners did not prove any cause of action against Eastman Dillon, we should think that this would be a complete answer to the petition so far as Eastman Dillon is concerned. To the extent, however, that this Court may for some reason not feel bound by the findings of the District Court,⁽⁵⁾ we shall argue:

I.

Petitioners failed to establish by any competent proof that Eastman Dillon defrauded the decedent or other Houde stockholders or that it was a party to or participated in any conspiracy to defraud the decedent.

II.

Eastman Dillon never received any moneys or property of decedent and at no time incurred any restitutionary liability toward decedent or petitioners.

Since our arguments under Points I and II above will, we believe, convince this Court of the utter lack of merit in the petition, we shall not lengthen this brief by a discussion of the secondary question of the statute of limitations. To the extent that this question might, however, be considered by this Court of some importance so far as Eastman Dillon is concerned, we respectfully beg leave to join in the arguments made in this connection in the brief being submitted on behalf of the other respondents.

⁽⁵⁾ To the effect that this Court will not disturb findings supported by substantial evidence or grant certiorari simply to review evidence or inferences drawn from it, see: *Borden's Farm Products Co. v. Ten Eyck*, 297 U. S. 251; *General Talking Pictures, Inc. v. Western Electric Co.*, 304 U. S. 175.

POINT I.

Petitioners failed to establish by any competent proof that Eastman Dillon defrauded the decedent or other Houde stockholders or that it was a party to or participated in any conspiracy to defraud the decedent.

As shown by the opinion of the District Court (R. 198), and as more fully appears from the complaint (R. 7-41), the gravamen of plaintiffs' cause of action is, and of necessity must be, the alleged fraud of the respondents in inducing the decedent to sell his Houde stock.

The proof found in the record is plainly insufficient to establish any fraud or wrongdoing on the part of Eastman Dillon. The evidence pertaining to Eastman Dillon, when reduced to simple and compact form, establishes just this:

Early in 1928, Eastman Dillon unsuccessfully attempted to interest the Houde stockholders in a plan of public financing. In the summer of 1928, it attempted (1) to ascertain the price at which the stock could be bought, and (2) to find a purchaser willing to pay that price. It was unable to find such a purchaser. After Cooley purchased the stock, it considered but abandoned a plan of public financing on his behalf. In November, 1928, it interested Barnes and his associates in Houde. Eventually, Barnes and his associates purchased the Houde stock and, in consideration of the efforts of Eastman Dillon and by reason of its qualifications as a distributor of stock, it was accorded an opportunity to, and did, purchase a one-third interest in the stock of the Houdaille Corporation and subsequently sold the same to the public. In the interim, it received the sum of \$15,000 from the Bank "in appreciation of the efforts" theretofore unsuccessfully made by it to find a purchaser for the stock.

The foregoing constitutes Eastman Dillon's sole connection with the entire Houde matter. There is not one circumstance connected with these facts, or for that matter with any of the facts in the case, from which an intent to defraud the decedent can be imputed to Eastman Dillon. The only possible inference which may be drawn from the evidence is that Eastman Dillon in its dealings with respect to the Houde stock at all times acted honestly and with a legitimate and lawful object in view. Eastman Dillon had the right to engage in the business for which it was organized, to wit, the investment banking business. In this connection, it also had the right to solicit new business and, as an incident thereto, to contact prospective customers and make proposals for public financing. Finally, when and if there eventuated a public financing, as was here the case, it certainly had the additional right to participate in the same and make a public offering of stock.

The fact that the decedent happened to be the owner of approximately 46% of the Houde stock does not alter the situation as far as Eastman Dillon is concerned. It was not interested at any stage in acquiring the Houde stock for its own account or in joint account with others, whether owned by the decedent or any one else (R. 2192). It was only interested, as any other investment banker would have been, in the Houde situation as such and the possibility that that situation might present for an opportunity to engage in some form of public financing. Since such an interest was both legitimate and proper, and since the evidence is inconsistent with any other motive or purpose on the part of Eastman Dillon, no fraud or fraudulent intent can possibly be imputed to it.

Shultz v. Hoagland, 85 N. Y. 464;

Bernheimer v. Rindskopf, 116 N. Y. 428, 436;

Constant v. University of Rochester, 133 N. Y. 640, 648.

As stated in this connection by the New York Court of Appeals in *Shultz v. Hoagland*, *supra*, at page 467:

“The case furnishes no exception to the rule that fraud is to be proved and not presumed. * * * It is seldom, however, that it can be directly proved, and usually is a deduction from other facts which naturally and logically indicate its existence. Such facts, nevertheless, must be of a character to warrant the inference. It is not enough that they are ambiguous, and just as consistent with innocence as with guilt. That would substitute suspicion as the equivalent of proof. *They must not be, when taken together and aggregated, when interlinked and put in proper relation to each other, consistent with an honest intent. If they are, the proof of fraud is wanting.*” (Italics ours.)

Apparently realizing that there is not the slightest evidence that Eastman Dillon actively and affirmatively defrauded the decedent, petitioners have heretofore sought to fasten liability on that firm on the theory that it in some manner participated in a conspiracy to defraud the decedent. In speaking of this claim of petitioners, the Circuit Court of Appeals in the majority opinion of Judge Clark summarized petitioners' contentions and expressed its views thereon, as follows (R. 2336):

“It may be added that plaintiffs' claim of conspiracy depends on a highly involved series of inferences, all against the direct findings of the court. They think that a conspiracy of the bank officials and the investment brokers to get possession of the Houde stock, in order to turn it over for large secret profits,

matured as early as July, 1928. Hence with decedent in Europe, and with Chisholm a co-conspirator, the opportunity arose. The Bank was an agent and a fiduciary, but nevertheless was the real purchaser of the stock and Cooley was only a front for the Bank. And hence the 'kickback' arrangement must actually have been made sometime before the claimed sale of October 11 and as a part of the plan. And this conspiracy was carried out by the other steps leading to the disposal of the stock at an advance and division of the profits. And decedent never knew that the Bank, which was actually his agent, was thus constantly working against his interests. *But the evidence does not afford a basis for these deductions, and the district court has found directly to the contrary.*" (Italics ours.)

The District Court and the Circuit Court of Appeals, of course, correctly construed the evidence. The record is absolutely barren of any proof, circumstantial or otherwise, that Eastman Dillon ever attempted or desired to obtain the Houde stock for its own account, much less that it intended to resell the same at a profit. Eastman Dillon was not engaged in the business of purchasing, for its own account, the securities of a going concern. Its business, like that of any other investment banker, was that of assisting its customers in acquiring additional assets or in raising additional capital through a public offering of securities (R. 2060).

In regard to the further contention of petitioners, namely, that the decedent and other Houde stockholders were induced to enter into the agreement of September 26, 1928 (Ex. P-95) and to sell their stock upon false and fraudulent representations of certain of the other respondents, our answer is, first, that, as expressly found by the

District Court, such is simply not the fact (R. 208, 217, 227-8), and secondly, that even if some such representations were made, they were not made at the instance or request of Eastman Dillon and were at no time or in any way countenanced by it. The fact is Eastman Dillon took no part whatever in the negotiations surrounding the procuring of the option and never had any knowledge or notice of the nature or character of the representations made either to the decedent or to the other Houde stockholders (R. 211, 213, 329, 356, 734, 1311-2, 1431). Accordingly, if any fraud was in fact committed in obtaining the option, Eastman Dillon is certainly not liable or accountable therefor. As stated in Cooley on Torts, Volume I, Section 85 (p. 275):

“ * * * where several persons are engaged in the accomplishment of a lawful object, if one or more becomes a tortfeasor, even with a view to aid such purpose, the others, who neither direct nor countenance such tortious act, are not liable.”

Considering plaintiffs' charges of conspiracy as a whole, the best and most convincing evidence that Eastman Dillon was at no time engaged in a common design or effort to obtain the Houde stock for the joint account of itself, the Bank and Central Trust Company, and had no such purpose in view when it suggested the obtaining of an option, is that it did not participate in any manner in the Cooley purchase (R. 213, 216, 221, 1434, 2147), that it unequivocally declined to go forward with the Cooley financing (R. 228, 949-50, Ex. P-74), that it did not participate, directly or indirectly, in the syndicate thereafter formed to purchase the stock from Cooley (R. 230, 1178-80, 1431-3, 1914-5, 1961-2), and that neither the Bank nor Central Trust Company in any way participated with it in the Houdaille financing (R. 242). Petitioners cannot explain away these facts.

POINT II.

Eastman Dillon never received any moneys or property of decedent and at no time incurred any restitutionary liability toward decedent or petitioners.

While the instant action was at all times up to and including the close of the trial prosecuted and considered by all the parties concerned, including the District Court, as essentially an action for fraud and deceit (R. 198), petitioners have since asserted that proof of fraud was unnecessary to their cause of action and that liability might be imposed upon Eastman Dillon on the theory that it in some manner came into possession of property of the decedent, knowing or being chargeable with the knowledge that such property had been derived from a breach of trust, and that it should, accordingly, be required to disgorge the profits allegedly realized therefrom or respond in damages therefor.

Any possible liability on the part of Eastman Dillon on this theory of recovery is of necessity predicated upon the following hypotheses, viz.: (1) that the Bank undertook to and did act as the decedent's agent in the sale of his Houde stock; (2) that the Bank, through the guise of an apparently *bona fide*, but utterly fictitious, sale of all the Houde stock to Cooley, and later by becoming a participant in the syndicate formed to acquire such stock, obtained an interest in the subject matter of its agency in violation of its duties as decedent's agent; (3) that Eastman Dillon knew or was chargeable with knowledge of all of the foregoing facts, including the fact that the sale of the Houde stock to Cooley was purportedly nothing more than a sham; and (4) that with such knowledge Eastman Dillon became the transferee

of property thus derived from the decedent. Unless each and every one of the aforesaid propositions is substantiated by a fair preponderance of the evidence, it is obvious that no cause of action for restitution or damages was or could be made out against Eastman Dillon. We believe that plaintiffs' failure to sustain this burden of proof is patent.

There is absolutely no proof that Eastman Dillon ever received any moneys or property of the decedent. The Houde stock, about which these lawsuits have been built, never came into Eastman Dillon's possession or control nor did it at any time acquire or purport to acquire title thereto. On the contrary, all of such stock was purchased and acquired by Harris, Small & Co. from the Cooley syndicate for the sum of \$6,000,000 and was by it transferred (together with \$480,000 in cash) to the Houdaille Corporation of Michigan in exchange for 108,000 shares of Class A Stock and 148,000 shares of Class B Stock of that corporation (Amended Complaint, Ex. B, R. 37-42, Exs. P-427A-D). Pursuant to the agreement in writing of November 20th between Harris, Small & Co. and Eastman Dillon, the latter thereafter purchased and acquired 36,000 shares of said Class A and 46,000 shares of said Class B stock of the Houdaille Corporation from Harris, Small & Co. for the sum of \$2,160,000 cash⁽⁶⁾ (Ex. P-426). To the extent, therefore, that petitioners would imply that Eastman Dillon received any of the decedent's Houde stock, their claim is manifestly without foundation.

As to the \$15,000 received by Eastman Dillon from the Bank on November 20, 1928, any claim that said sum constituted property of the decedent must of necessity be

⁽⁶⁾ Under the circumstances at hand, Eastman Dillon clearly became a *bona fide* purchaser for value of the Houdaille stock acquired by it. N. I. L. §§91, 95.

predicated on the proposition that such sum of \$15,000 represented a portion of the moneys paid by the decedent to the Bank as part of its commission on the sale of the Houde stock. The difficulty with this proposition is that it is not only unsupported by but contrary to the evidence. The Bank's total commission upon the sale of all the Houde stock amounted to \$126,318.33 (R. 26). This sum was paid to it on or about December 5, 1928 (R. 1020-1, 1170-1, Exs. P-1, P-166). Since this was some fifteen days after the date of the \$15,000 payment to Eastman Dillon, it is obvious that such payment could not have been made out of the Bank's commission but necessarily came out of the Bank's own funds. In addition, it appears that of the total commission paid to the Bank, less than 47% thereof, or \$58,270.89, was paid by the decedent (Amended Complaint, R. 29-30). The balance of \$68,047.44 represents the commission paid by the other Houde stockholders and, so far as these lawsuits are concerned, must be deemed to have been properly received by the Bank under the decision rendered in *Shultz v. Manufacturers & Traders Trust Co.*, 254 App. Div. 128 (4th Dept.), aff'd, 279 N. Y. 781. Assuming, therefore, but not conceding, that the sum of \$15,000 received by Eastman Dillon was paid to it out of the Bank's commission, there is no more reason to believe that the Bank used the portion of such commission paid by the decedent than the portion contributed by the other stockholders. In fact, if petitioners are correct in their contention that the portion of the commission paid by the decedent was improperly received by Bank and became impressed with a trust for the decedent's benefit, the presumption (created as a matter of law) is that the Bank in making payment of said \$15,000 to Eastman Dillon necessarily used

its own funds and no portion of the moneys paid by the decedent as a commission.

Importers and Traders Nat. Bank v. Peters, 123 N. Y. 272, 278;

Matter of Holmes, 37 App. Div. 15, 20 (3rd Dept.), aff'd, 159 N. Y. 532;

Clarke v. Public Nat. Bank & Trust Co., 259 N. Y. 285;

Bonham v. Coe, 249 App. Div. 428, 435 (4th Dept.), aff'd, 276 N. Y. 540.

The claim of petitioners is subject to the further fatal objection that they have failed to establish any agency or violation of duty on the part of the Bank towards decedent. In the brief being submitted on behalf of the other respondents, it is demonstrated that in the light of all the evidence the relationship between the decedent and the Bank must be deemed to have been that of optionor and optionee and not that of principal and agent. It is also shown that irrespective of the precise legal relationship which may have existed between the Bank and the decedent—whether that of principal and agent or not—there had in no event been any breach of fiduciary duty toward the decedent. Since we fully concur in the arguments and points of law upon these issues, as set forth in said brief, any discussion of such issues in this brief would simply be repetitious and unnecessarily burdensome to this Court. We shall, accordingly, proceed to a consideration of the further question presented, namely, that of Eastman Dillon's knowledge or lack of knowledge of any agency relationship which might be assumed to have existed between the Bank and the decedent and any possible breach thereof.

Since the decedent was in Europe at the time of the execution of the instrument of September 26, 1928 (Ex. P-98), and was not present at any of the negotiations leading up to the execution thereof, petitioners must necessarily rest their claim that the Bank became decedent's agent upon the long cablegram, Exhibit P-105a, which was sent to him by Chisholm on October 2, 1928. With respect to this cablegram, the District Court affirmatively found, and the unquestioned fact is, that Eastman Dillon not only did not participate in the dispatch of said cablegram but did not even know of the existence thereof—not to mention its contents (R. 213, 737, 1319-21, 1380-1). It is evident, therefore, that if any alleged agency on the part of the Bank arose out of the cablegram of October 2nd, Eastman Dillon was not, and could not have been, aware thereof.

In this connection, it is significant to observe that Buffington and Rea, in their discussions and correspondence antedating the instrument of September 26th, spoke only in the terms of option, not agency (R. 208, 1386-8, 1474-5, 2059-60, Exs. P-55, P-57, P-61, P-62, P-66). An option is what Buffington suggested be obtained and that is what he anticipated would be obtained. He neither suggested nor requested anything else. If, under these circumstances and as petitioners maintain, the Bank undertook to obtain an agency instead of an option, it is clear that it did so without the knowledge, consent or approval of Eastman Dillon. It is also clear that if the Bank thus actually did undertake to act as decedent's agent its knowledge in that respect can not be imputed to Eastman Dillon.

Weisser v. Denison, 10 N. Y. 68;

Taylor v. Commercial Bank, 174 N. Y. 181;

Corrigan v. Bobbs-Merrill Co., 228 N. Y. 58, 69.

Turning to petitioners' claim that the sale of the Houde stock to Cooley was not a *bona fide* one but only a sham, the answer, assuming petitioners' contention to be correct, is that such fact was completely unknown to Eastman Dillon. The proof shows that Eastman Dillon in no way participated in the negotiations which resulted in the sale to Cooley (R. 213, 216, 1434, 2147) and that it was not even informed thereof until October 15, 1928—some five days after Cooley had agreed to buy the stock (Ex. P-402). In addition, Eastman Dillon at no time knew that Cooley was a director of the Bank (R. 237, 2152) and was also unaware that the Bank had financed his purchase (R. 216, 227, 2151).

From the petition it appears that petitioners, in referring to the sale to Cooley, place considerable emphasis upon two instruments or memoranda, dated October 11 and October 13, 1928, respectively, which are known in these suits as Exhibits P-112 and P-113. In fact, petitioners go so far as to state that these memoranda constitute the "core" of their case and that "without them neither decedent nor petitioners had cause for complaint" (petition, p. 15). Assuming that everything which petitioners say about these memoranda is true and that they are to be accorded the significance sought to be attached to them, the all dispositive answer so far as Eastman Dillon is concerned is that it was not a party to either of said memoranda, had no part in the discussions leading up to their preparation and never knew of their existence or of the understandings therein expressed (R. 214-6, 219-21, 2151-3).

It appears from the instrument of October 13, 1928, the provisions of which are set forth at length at pages 219-221 of the record, that, under certain contingencies, the parties thereto contemplated the formation of an underwriting syndicate in which certain parties they might agree upon,

including Eastman Dillon, would be permitted to participate. Harriman, the President of the Bank and one of the parties named in said instrument, when questioned concerning the insertion therein of the name of Eastman Dillon, testified that at no time either prior or subsequent to October 13, 1928 had he discussed the matter of the participation of Eastman Dillon in the proposed syndicate with any member of that firm, or with Buffington, that neither Rea, Wurst nor Cooley (the other parties concerned) had said that they had had any such discussion with any one associated with Eastman Dillon, that he knew of no request by Eastman Dillon, or Buffington, for an opportunity to participate in such syndicate, and that no such request had been reported to him by Rea, Wurst or Cooley (R. 1178-9). He further stated that Eastman Dillon never had any interest whatever in the syndicate which was subsequently formed by Cooley on or about November 1, 1928, or any interest in the share in that syndicate of the Bank and its affiliate, Western New York Investors, Inc., and that at no time did the Bank or Western New York Investors, Inc. agree to divide, or actually divide, any part of their syndicate profits with Eastman Dillon (R. 1178-80). Rea, Cooley and Wurst, each questioned along the same lines, testified similarly (R. 1431-3, 1914-5, 1961-2).

Under the above circumstances, it seems obvious that if the decedent, who became a member of the Cooley syndicate, was unaware, as petitioners contend, of the circumstances purportedly stigmatizing the sale to Cooley as a fictitious one, Eastman Dillon, who concededly had no connection with such syndicate, did not and could not have known of the same and was justified in believing that said sale was in all respects *bona fide* and proper.

Conclusion.

So far as Eastman Dillon is concerned, no question is presented for review by this Court and the application for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1942.

No. 404.

WYATT D. SHULTZ and CAROLYN SHULTZ, as
Co-Executors under the Last Will of Albert B.
Shultz, Deceased,

Petitioners,

vs.

MANUFACTURERS & TRADERS TRUST COMPANY,
Individually and as Co-Executor under the Last Will
of Albert B. Shultz, Deceased, *et al.,*

Respondents.

PETITIONERS' REPLY BRIEF

ELLSWORTH C. ALVORD,
JULES C. RANDAL,

Petitioners' Counsel.

Abbreviations

The abbreviations are those used in the petition.

The answering brief for all respondents except Eastman, Dillon & Co. is herein referred to as the Bank's brief. The answering brief for Eastman, *et al.*, is referred to as Eastman's brief.

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 404.

WYATT D. SHULTZ and CAROLYN SHULTZ, as Co-Executors under the Last Will of ALBERT B. SHULTZ, Deceased,

Petitioners,

against

MANUFACTURERS & TRADERS TRUST COMPANY, Individually and as Co-Executor under the Last Will of ALBERT B. SHULTZ, Deceased, PERRY E. WURST, LEWIS G. HARRIMAN, FREDERICK B. COOLEY, GEORGE H. CHISHOLM, HARRY L. CHISHOLM, RALPH HOCHSTETTER, ANSLEY W. SAWYER;

and

THOMAS C. EASTMAN, HERBERT L. DILLON, HENRY L. BOGART, JR., GILMER SILER, Individually as well as Co-Partners with JAMES P. MAGILL and MAURICE H. BENT, doing business under the firm name and style of Eastman, Dillon & Company,

Respondents.

Consolidated
Causes.

WYATT D. SHULTZ and CAROLYN SHULTZ, as Co-Executors under the Last Will of ALBERT B. SHULTZ, Deceased,

Petitioners,

against

MANUFACTURERS & TRADERS TRUST COMPANY, as Co-Executor under the Last Will of ALBERT B. SHULTZ, Deceased, THOMAS CANTWELL and GEORGE P. REA,

Respondents.

PETITIONERS' REPLY BRIEF

Reply to the Bank's brief

Respondents' argument on the issue of limitations would be appropriate to a brief on plenary hearing. As upwards of one hundred twenty-five authorities are cited, their discussion, much less analysis, is out of the question. A few comments—necessarily discursive—must suffice.

Respecting respondents' answer concerning the First Question presented by the petition (at p. 2), argued under Reasons I-III (at pp. 36-40) of our brief-in-chief.

Respondents substantially default in making answer to our contentions. Their only argument on the subject is the claim that even if the Circuit Court of Appeals was not bound as a matter of law to follow the New York law of limitations, it was proper for it to do so. This argument becomes possible for respondents only by avoiding mention of *Kirby v. Lake Shore & M. S. Railroad* (120 U. S. 130), where this court rejected as inconsonant with equity* the identical New York doctrine of limitations applied in the suits at bar. If that case is still law—and respondents neither cite nor refer to *Kirby's case* although it was cited in our brief-in-chief (p. 37) as ruling authority—the decision of the Circuit Court of Appeals was clearly “improper” and constitutes basic error.

Respecting respondents' answer concerning the Second Question presented by the petition (at p. 3), argued under subdivision A of Reason IV (at pp. 40-47) of our brief-in-chief.

Respondents present two main contentions, viz: first, these suits are “nothing more than” actions “at law to recover money only” (Bank's brief, p. 46); second, even if these suits are properly in equity, no accounting is required because complete relief can be had in actions for money received, the demand for an accounting is a mere sham, and, accordingly, the controlling statute of limitations is the six-year statute prescribed for actions for money received. We examine the arguments underlying these contentions and show that they are based upon false premises of law and fact.

Arguing in support of their first contention, respond-

* Because applied “irrespective of the plaintiff's ignorance of his rights because of the fraud or inequitable conduct of the defendant.” Mr. Justice Stone in *Russell v. Todd*, 309 U. S. 280 at 288, Note 1.

ents invoke the familiar doctrine that as a general rule equity will not decree an accounting in furtherance of a claim based on tort. The only authority cited in point is this court's decision in *U. S. v. Bitter Creek Development Co.* (200 U. S. 451) where the tort was not committed within a fiduciary relation and its gravamen consisted of a trespass on timber lands and trover for the conversion of the timber.

Cases of fraud (e.g., *Kirby's case, supra*) present a well recognized exception to the general rule—particularly where the fraud was committed in the course of a fiduciary relationship (e.g., *Kilbourn v. Sunderland*, 130 U. S. 505). In the last cited case an agent was found guilty of constructive fraud in that he had realized profit from dealings in the subject matter of his agency. The same claims as those now made by respondents were made in the *Kilbourn case*, to which Mr. Chief Justice Fuller made the following response:

*"The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances. The parties stood in a fiduciary relationship to each other * * *. 'There cannot be any real doubt that the remedy in equity, in cases of account, is generally more complete and adequate than it is or can be at law' (1 Story, Eq. Jur. Sec. 450); and, as the remedy at law in the case in hand was rendered embarrassed and doubtful by the conduct of the defendants, and fraud has in equity a more extensive signification than at law, and, as charged here, involved the consideration of the principles applicable to fiduciary and trust relations between the parties throughout the period of their connection, we concur with the supreme court of the District in sustaining the jurisdiction". (Italics ours; 130 U. S. 505 at 515)*

The same factors thus indicated by this court in *Kilbourn's case* as establishing equity jurisdiction are plainly present in the suits at bar.

Next respondents assert that "the suit at bar clearly could have been maintained at law." (Bank's brief, p. 55)

The cases and statutes cited for this proposition do not remotely support it and have about as much relevance to this or any other issue in these suits as has the Rule in Shelley's case. The bona fides of this claim will be illuminated by the quotations contained in the note hereto.* We respectfully refer the court to the authorities cited in the note at the bottom of p. 41 of our brief-in-chief as establishing the rule, "never * * * departed from" (*Peters v. Smith*, 60 N. Y. Misc. 203 at 205), that no action at law lies by one executor or administrator against his corepresentative.

Respondents' second argument (i.e., that no accounting is necessary) is based on statements of fact some of which are disingenuous and others of which are flatly untrue. It is suggested that petitioners are only seeking an accounting for the syndicate profits derived by those respondents who participated in the syndicate ostensibly formed by Cooley (pursuant to the secret arrangements partially evidenced by Exs. P-112/3); that the profits sought to be accounted for "were *received in money and money alone*," and that "no property was involved" (italics in original); that the amount of such profits "were and are known and definite", and were "calculated on the same basis as decedent's profits" from the Cooley syndicate (Bank's brief, pp. 44, 48).

Sundry corrections are in order. The second and third of our special prayers for relief read as follows:

"2. That the defendants and each of them be required to account for all cash and/or the value

* Prior to the institution of the suits at bar petitioners sought to have the Bank removed as their co-executor (petition, pp. 27-8). Opposing this relief, the Bank filed a brief with the New York Court of Appeals signed by all counsel (excepting only Mr. Damon) who now subscribe its brief to this court. At the outset of that brief the Bank stated (p. 4) that it was "well-settled law which permits the institution in equity of an action by one executor against a co-executor to obtain a decree establishing the latter's indebtedness to the estate, even while the latter continues to occupy his testamentary office. (*Wallach v. Dryfoos*, 140 App. Div. 438)," and at the end of that brief (p. 65) that "it seems clear in this State that a suit in equity may be maintained by one executor against a co-executor to obtain a decree establishing his indebtedness to the estate. *Wallach v. Dryfoos*, 140 App. Div. 438".

of *all property* received by them by reason of their dealings in the stock of Houde prior to December 5, 1928, *including dealings in the stock of Houdaille Corporation* whose sole asset was the stock of Houde, and that the primary defendants be adjudged liable for interest from December 5, 1928, with semi-annual rests on the sums for which they may be held liable to account, and that the other defendants not guilty of active fraud be held liable for simple interest from December 5, 1928.

"3. That the primary defendants [i.e. those guilty of active fraud] pay over to the plaintiffs the damages sustained by decedent * * * less any principal sums for which decrees may be entered and satisfied under the preceding prayer for relief, together with interest".* (*Italics and bracketed matter ours*; I 30, 127-8).

The pleadings, then, contradict respondents' contentions as to the limited scope of the accounting sought. And so do the proofs. Eastman-Dillon received the bulk of their profit in the form of property, viz.: 10,000 shares of the Class B stock of Houdaille (Mich.) [V., references at petition, p. 23]. Eastman-Dillon also realized a gross trading profit of \$216,000.00 upon the public offering of that stock and thereafter engaged in an after-market syndicate for its secondary redistribution [v., Ex. P-460], the amount of the profit on which we were not allowed to prove because the right to an accounting had not been established [II 1042].

Rea and Buffington also had dealings in the stock of Houdaille, and if they did not realize profit therefrom, could have done so [I 695, III 2127].

The amount of these profits is not now "known and definite", nor is the amount of the profits realized by the

* A reading of these prayers for relief establishes the untruthful character of the suggestions (Bank's brief, pp. 44-5, 47) that petitioners are attempting to recover at one and the same time the profits realized from Houde's stock and the difference between its value and what decedent received therefor. Damages are sought only to the extent necessary to make decedent's estate whole after profits have been disgorged. This is clearly proper and involves no possibility of a double recovery or inconsistency. (Restatement of Agency, §424, Comment c, p. 971). Both remedies are predicated on an affirmation of the transaction.

Bank and its officers from the Houde transactions "known and definite" nor can it be "known and definite" until the items of the syndicate account [Ex. P-192] have been explored and that account recast. The nature of some of these items is indicated in the first note at the bottom of p. 24 of the petition. An examination of the syndicate account [Ex. P-192] and Cooley's cash disbursements ledger [Ex. P-363c] suggests other sources for fruitful inquiry.*

Once the respondents' factual misstatements are exposed the entire basis for their citation of cases where a *complete* recovery could have been had in an action for money had and received is removed. Our brief-in-chief points out (pp. 44-7, 49) the other considerations which make it manifest that actions for money had and received could not constitute adequate, much less complete, remedies in the complicated fact situation disclosed by this record.

Respondents emphasize by frequent iteration still a third argument, viz.: the character of the cause of action sought to be enforced determines the statute of limitations to be applied.

This contention must be examined. There is, of course, no question but that where there are concurrent remedies at law and in equity, the limitation applicable at law controls in equity. But it is not enough that there be some remedy at law. To be concurrent, that remedy must be adequate—as certain, perfect and complete as the remedy afforded in equity. (*Hanover v. Morse*, 270 N. Y. 86 at 89; *Hearn Corp. v. Jano*, 283 *id.* 139 *cf.*, quotation at p. 3, *supra*, from this court's decision in *Kilbourn's* case.) Thus, where the directors who gained profits from their breach of trust sought to plead the six-year statute (C.P.A. §48 [1]) in bar of their liability in *Potter v. Walker*, the New York Appellate Division answered:

* E.g.—these exhibits indicate that \$3,000 was deducted from the Bank's commission "for other expenses". This sum plus \$98.48 (representing cost of stock transfer tax stamps on the October 24th sale) was obtained in cash by Cooley. For enlightenment as to Cooley's use of dummy payrolls to obtain cash for "confidential" purposes, please see III, 1902-3.

“As to these defendants an action at law would not be *as complete or effective as the remedy in equity*. (*Falk v. Hoffman*, 233 N. Y. 199.) These defendants, therefore, were not entitled to plead the six-year statute of limitations at law, *since the ten-year Statute of Limitations in equity would apply*. (*Hanover Fire Ins. Co. v. Morse D. D. & R. Co.*, 270 N. Y. 86.)” (Italics ours; 252 N. Y. App. Div. 244, 246.)

When the profiting directors in *Potter v. Walker* renewed their contentions in the New York Court of Appeals, that court approved the reasoning and result of the decision below, and, after paraphrasing the foregoing quotation, said:

“In respect to those causes of action by which is sought to recover profits received by directors by reason of wrongful acts, *an action at law would not afford adequate relief*.” (Italics ours; 276 N. Y. 15, 25-6.)

It is thus clear that adequacy of remedy and not the nature of the right sued upon controls—that the ten-year limitation (C.P.A. §53) applies to suits in the concurrent jurisdiction of equity unless the remedy at law is as certain, perfect and complete as that afforded in equity. Such is the reading given the New York cases by the present Chief Justice in *Russell v. Todd* (309 U. S. 280 at 292, N. 3). And such is the rule adopted by this court, for in that case—although the right sued upon was a statutory legal right and no accounting was necessary—your Honors declined to apply any statute of limitations because the *remedy* was traditionally equitable to enforce rights cognizable only in equity.*

Respondents challenge our statement that the liability in an action for money received is several and not joint. *Cobb v. Dows*, 10 N. Y. 335, and the other cases cited to

* This court denied (310 U. S. 658) a petition for rehearing based upon the fact that *Mencher v. Richards*, 256 N. Y. App. Div. 280, relied upon as an alternative ground of decision, had been reversed in the New York Court of Appeals (283 N. Y. 176).

the point at p. 58 of the Bank's brief involve situations where, unlike the fact at bar, the money was received jointly, as by partners.

Respecting respondents' answer concerning the Third Question presented by the petition (at p. 3), argued under subdivision B of Reason IV (at pp. 48-53) of our brief-in-chief.

The petition tenders, and with precision, the question of whether the trial court's fifth conclusion of law to the effect that decedent knew the "basic and material" facts can be upheld in the face of its 84th finding of fact. By that finding, which the Circuit Court of Appeals did not disturb, it was determined that there was no evidence that decedent knew of the arrangements evidenced by Exs. P-112/3, much less that they had been reduced to writing.

Respondents' inability to meet this issue is measured by their failure to mention Finding 84 in their briefs. Instead they misstate our contentions, and proceed to an answer to those contentions, as misstated.

Thus, respondents say (Bank's brief, p. 39) that we "frankly concede (Pet. p. 15) that without the memorandum of October 11th they have no case." There is no such concession at page 15 or at any other page of the petition, and the statement is utterly untrue. Ex. P-112 evidenced some, but not *all* of the agreements made on the night of Oct. 10. Indeed, there was never reduced to writing at all the most important of these agreements, viz.: that the Bank's officers were to have a "substantial part of the purchase" through participation in the syndicate which Ex. P-112 contemplated.

Similarly, respondents argue that Ex. P-113 was not an agreement, but a mere "declaration." This argument begs the question of whether Ex. P-113 (referred to by Cooley and Rea as their "agreement" [I 746-8, II 1120, 1465]) was preceded by an agreement. Respondents' own testimony establishes the fact that before "we came to an understanding" [I 747] there had been lengthy negotiation as to the division of the prospective profits

on the resale of Houde's stock which was the objective of all the parties to the "understanding."**

Eventually respondents are driven to fall back on Judge Clark's argument that had they but been allowed to testify as to their transactions with the decedent, they might have proved that they had made full disclosure of the arrangements evidenced by Exs. P-112/3. But this argument is not available to respondents, for it was conclusively established that these arrangements were kept concealed not only from decedent but from the Bank's own directors as well. [V., references at brief-in-chief, p. 52] And before the existence of Ex. P-113 was known Harriman swore *in these very suits* that it was not until after Oct. 31 (i.e., nearly three weeks after decedent was notified that a binding sale of his stock had been effected) that Cooley had announced that the Bank's officers would participate in the profits of Houde's resale.

Judge Clark's criticism of petitioners' course in invoking C.P.A. §347—the dead man statute—seems unintentionally ironic. The very testimony given by Wurst which he cites [III 2330] was adduced only after petitioners had introduced Ex. P-542 in evidence, Wurst having theretofore repeatedly denied under oath that any such arrangement as that evidenced by that instrument (which bore his signature) had ever existed. [III 2296-7, I 960-2]

Reply to Eastman's brief

The joint and several liability of Eastman-Dillon does not depend on proof of conspiracy, and was clearly established. Since the Bank was Eastman-Dillon's agent in acquiring Houde's stock, the Bank's frauds were Eastman-Dillon's frauds. That liability in no way depends on proof of scienter on the part of Eastman-Dillon. (*Downey v. Finucane*, 205 N. Y. 251; *Bennett v. Judson*, 21 N. Y. 238;

* Thus, Rea and Wurst traded out the Bank's 50% participation in the profits on a quick resale by successfully urging that Cooley "ought to recognize" that that "would be the proper thing" in the event that no syndicate was formed in which it could participate. [II 1119-20]

Indianapolis Ry. Co. v. Tyng, 63 N. Y. 653 at 655). The relationship between co-venturers is one of sub-modal partnership (*Mann v. Commonwealth Corp.*, 27 F. Supp. 315, 320), and the torts of one co-venturer are the torts of the other co-venturers on familiar agency principles.

Alternatively, Eastman-Dillon is jointly and severally liable with its agent, the Bank, because it asked for, obtained and still retains benefits derived from its agent's frauds (i.e., \$15,000 received and acknowledged by it as "representing *our interest* in commission for the sale of" Houde's stock [Ex. P-86]). Having thus adopted the frauds of its agent, its joint and several liability follows. (*Green v. Waddington*, 210 N. Y. 79 at 82; *Krum v. Beach*, 96 *id.* 398).

The argument that Eastman-Dillon need not disgorge the \$15,000 received by it out of the Bank's commission is founded on the claim, the documents notwithstanding, that this was "a voluntary gift" from the Bank (Eastman's brief, p. 24) and did not come out of its commission. This claim is predicated on the assertion that the Bank did not collect its commission until "some fifteen days after the date of the \$15,000 payment to Eastman-Dillon." (Eastman's brief, p. 24) To support this claim respondents cite testimony and documents showing that the Bank did not credit its commission and bond profit account until December 5, 1928. But it is quite immaterial what bookkeeping treatment the Bank chose to give the commission collected by it. The only relevant fact is that on Oct. 24, the Bank drew receipts reciting its collection of a commission of \$126,318.33 on the sale of Houde's stock. It follows, of course, that if this \$15,000 was a gift, Eastman-Dillon can not occupy the position of a purchaser for value, and must therefore account to petitioners for this amount plus interest.

Reference to the citations contained in our petition and brief-in-chief will show that respondents' claims that we have misstated the facts are unfounded. By inadvertence we did omit to document our statement that the Scully claims presented decedent with the prospect of litigation.

Ex. P-330 is in Sawyer's handwriting; that exhibit and his testimony fully justify our statement.

CONCLUSION

Instead of coming to grips with the issues presented by the decision of the Circuit Court of Appeals and this application, respondents have devoted the bulk of their briefs to an argument in defense of the trial court's determination on the merits. That argument contains dehors the record personalities, and, we think, palpable factual distortions and misstatements. We do not correct these, and leave respondents' arguments on the merits unanswered because the merits are utterly irrelevant to the issues presented by this application.

The pretext assigned for this argument on the merits is that unless petitioners proved a cause of action the issue as to limitations is academic. This position is unsound. The judgment sought to be reviewed is based *solely* on a determination by the Circuit Court of Appeals that any claim for relief is barred by the New York law of limitations. If that decision is erroneous, our clients are, at the least, entitled to a remand to that court for its adjudication as to whether the trial court's determination on the merits can be reconciled with the law and the evidence. If this court's decision in *Kirby v. Lake Shore and M. S. Railroad* (120 U. S. 130), is still law, then the judgment at bar must be reversed (v., Finding 84, I 221); and even if *Kirby's case* is no longer law, the decision of the Circuit Court of Appeals must be reversed if in conflict with the applicable New York law of limitations.

The writ of certiorari should issue.

Respectfully submitted,

ELLSWORTH C. ALVORD,
JULES C. RANDAL,
Petitioners' Counsel.



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IN THE
Supreme Court of the United States

October Term, 1942.

No. 404.

WYATT D. SHULTZ and CAROLYN SHULTZ, as
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Shultz, Deceased,

Petitioners,

vs.

MANUFACTURERS & TRADERS TRUST COMPANY,
Individually and as Co-Executor under the Last Will
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Respondents.

PETITION FOR REHEARING OF APPLICATION
FOR CERTIORARI

ELLSWORTH C. ALVORD,
JULES C. RANDAL,

Petitioners' Counsel.

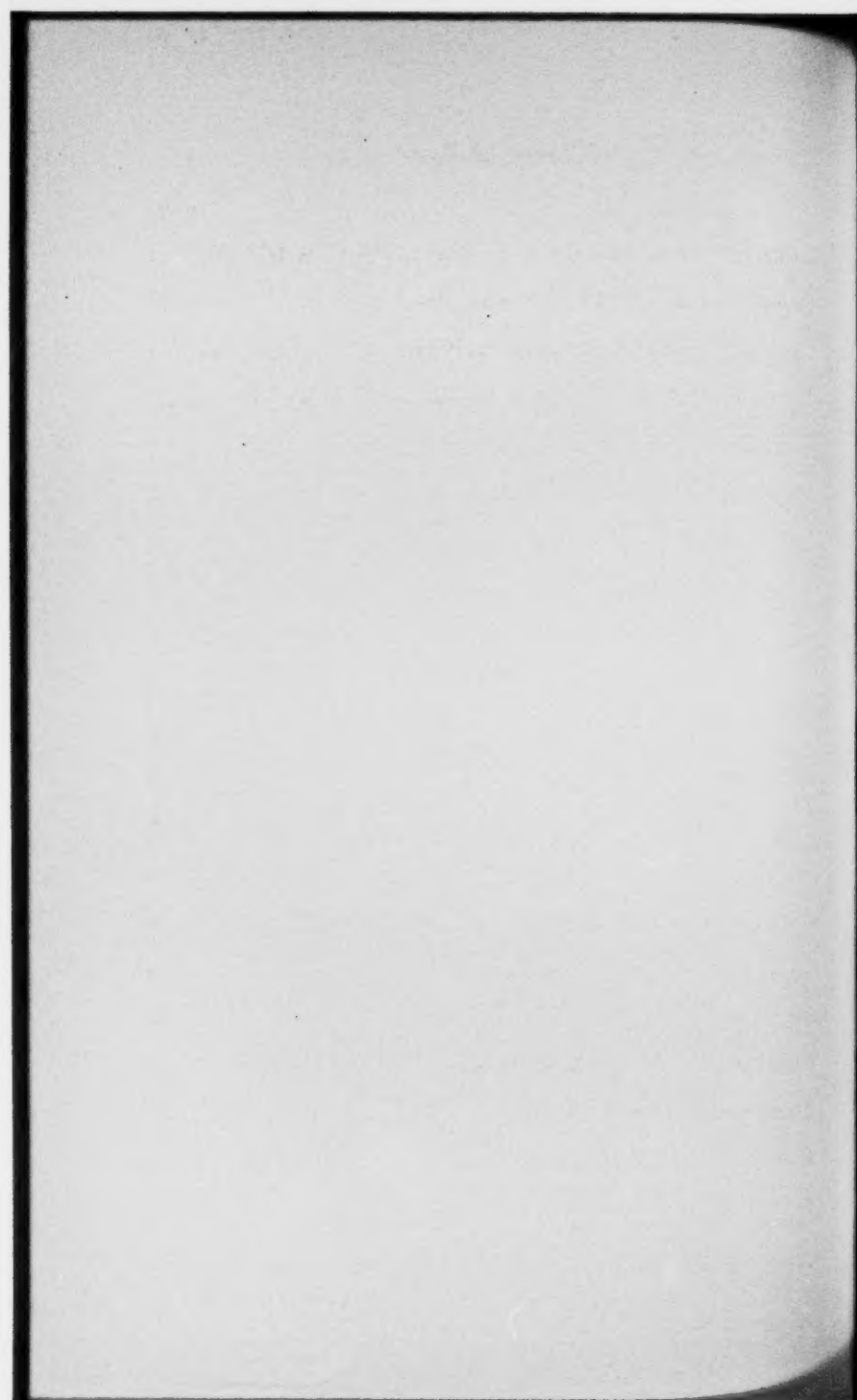


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Consolidated
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PETITION FOR REHEARING OF APPLICATION FOR CERTIORARI

This is a petition for rehearing of an application for certiorari (denied October 26th, 1942) to the United States Circuit Court of Appeals for the Second Circuit, and for the granting of a writ as prayed for in the original petition.

I.

It is respectfully submitted that certiorari should be granted because the Circuit Court of Appeals has here decided a federal question in a way in conflict with the decisions of this court in *Kirby v. Lake Shore & M. S. Railroad*, 120 U. S. 130 and *Michoud v. Girod*, 4 How. 503, 560-561.

The Circuit Court of Appeals has here held that because a concurrent remedy exists at law, suits in equity against agents for an accounting of concealed profits made at the expense of their principal,¹ and for other relief, are

¹ In these cases, the statute of limitations was applied on the theory that Shultz, petitioners' testator, had appointed the Bank his agent to sell his shares in Houde Engineer-

barred in six years after *the occurrence* of the acts complained of, under the state statute of limitations, although the plaintiffs did not discover and were not on notice of the fraud until after the expiration of the six year period and shortly before the commencement of the suits.²

In each of the two decisions of this court above cited, it was held that a suit in equity to recover secret profits might be maintained after the expiration of the period of the state statute of limitations if the inequitable conduct of the defendant had been concealed, and if suit was commenced promptly on the discovery of the facts. In each case there was a concurrent legal remedy.³ In the *Kirby* case, the defendants had contracted to carry freight for the plaintiff's interstate at the lowest rate, or to make an allowance to compensate for a lower rate given to any other shipper. The defendant had secretly given lower rates to other shippers. The Circuit Court for the Southern District of New York held that the suit could not be maintained, since, as it held, the New York courts would, irrespective of the concealment, treat the case as barred by the statute of limitations applicable to an action at law

ing Corp. The Bank found a purchaser, with whom it secretly shared in the profits of a resale of the shares. The court held that the agreement under which the Bank shared in the resale profit was made two days after the agreement between the Bank, as Shultz' agent, and the purchaser; and that therefore, under New York law, the cause of action at law for such secret profits was in the nature of assumpsit rather than fraud. The participation by the Bank's officers in the resale profits was unknown to Shultz (128 F. (2d) 893); according to Judge Frank, these arrangements were elaborately concealed (pp. 898-899).

² 128 F. (2d) p. 901; R., vol. I, pp. 2-4, 16; vol. II, pp. 866, 871-3.

³ *E. g. Sandoval v. Randolph*, 222 U. S. 161; *Standard Oil Co. v. Van Etten*, 107 U. S. 325, 332, and cases collected at 1 C.J.S. 733, Account Stated, §53-b.

on contract.⁴ *Michoud v. Girod*, supra, was a suit against executors for an accounting of profits out of concealed transactions in their individual capacities in the assets of the estate.

The *Kirby* and *Michoud* cases stand for the proposition that state statutes of limitations, which bar relief after the expiration of a given time from the occurrence of the act complained of, irrespective of when discovered, will not prevent federal courts from exercising their equity jurisdiction arising from the Constitution and the original Judiciary Act to relieve against concealed fraud, where and when it comes to light. The case at bar directly presents the question reserved by this court in *Russell v. Todd*, 309 U. S. 280, 294 as to

“the extent to which federal courts, in the exercise of the authority conferred upon them by Congress to administer equitable remedies, are bound to follow state statutes and decisions affecting those remedies.”

In *Russell v. Todd*, this court (at pp. 290-93) found that the New York statute of limitations, if applicable, would

⁴ Although the court went on to hold that the suit was barred by the plaintiff's laches, the determination that laches and not the statute of limitations constituted the applicable limitation was a matter of decision by this court, not dictum. At 120 U. S. p. 134, this court posed the question as follows:

“Did the circuit court err in adjudging that the suit was barred by the Statute of Limitations?”

At p. 139, this court answered the question, holding as follows:

“It results that even if this be not an action ‘to procure a judgment, other than for a sum of money, on the ground of fraud,’ within the meaning of the New York Code of Procedure, the limitation of six years, being applied here, does not, as adjudged below, commence from the commission of the alleged frauds.”

bar the suit in ten years, whereas it had been brought in less than four years. In the case at bar, the court held the suit, brought less than ten years after the commission of the wrongs complained of, barred by the six year statute of limitations of New York.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, and *Ruhlin v. New York Life Insurance Co.*, *id.* 202, do not prevent the federal courts from giving full effect to the salutary principle of the *Kirby* and *Michoud* cases. Dealing only with substantive law, neither the *Erie Railroad* nor *Ruhlin* case suggests that the powers of a federal court of equity can be clogged by a state statute of limitations, procedural in character,⁵ which rewards with immunity the perpetrator of a fraud agile enough to conceal his misdeeds for the statutory period.

This court has recently refused to permit a district court to grant a remedy conferred by statute but unknown to the equity jurisdiction of the federal courts. *Kelleam v. Maryland Casualty Co.*, 312 U. S. 377, 381-382. The doctrine of the independence of the federal courts in matters of equity procedure, re-emphasized by this court in *Atlas Life Insurance Co. v. Southern*, 306 U. S. 563, 568, should

⁵ Statutes of limitation are procedural law, not substantive law. *Townsend v. Jemison*, 9 How. 407, 413; *Campbell v. Holt*, 115 U. S. 620, 624-628; *Michigan Insurance Bank v. Eldred*, 130 U. S. 693, 696; *Central Vermont Railway Co. v. White*, 238 U. S. 507, 511; *Lightfoot v. Davis*, 198 N. Y. 261, 264; *Warner v. Buffalo Drydock Co.*, 67 F. (2d) 540, 542. Hence they cannot limit the right of parties to litigate in the federal courts causes of action of an equitable nature. *Ridings v. Johnson*, 128 U. S. 212; *Payne v. Hook*, 7 Wall. 425; *Mississippi Mills v. Cohn*, 150 U. S. 202; *Guffey v. Smith*, 237 U. S. 101; although in such suits the statute of limitations will be applied by analogy as a measure of the doctrine of laches, where to do so will not conflict with equitable principles. *Russell v. Todd*, 309 U. S. 280, 287-288.

not be nullified in this case, where to do so will confirm to the respondents the fruits of their long concealed fraud.⁶

II.

A further reason for the allowance of certiorari here is that the Circuit Court of Appeals has decided a question of local law in a way which conflicts with the applicable local rule. The Circuit Court of Appeals decided that all remedy against the respondent Rea was barred by the six year statute of limitations (New York Civil Practice Act, §48). It is admitted on the record that Rea was absent from and a non-resident of New York for seven years and four months (R. vol. II, pp. 1416-17; vol. I, p. 602); and that suit was commenced against him within six weeks after his return (R. vol. I, p. 3). If the court was right in holding the New York statute of limitations applicable, it should have nonetheless held that the statute did not bar the cause of action against Rea because the time of his absence should have been deducted in computing the period of his limitation (New York Civil Practice Act, §19; *Connecticut T. & S. D. Co. v. Wead*, 172 N. Y. 497, 503).

WHEREFORE it is respectfully prayed that a rehearing be granted on the petition for certiorari and that the writ be allowed.

Dated: New York, November 10, 1942.

WYATT D. SHULTZ

CAROLYN SHULTZ

as Co-Executors under the Last
Will of Albert B. Shultz, Deceased.

ELLSWORTH C. ALVORD,

JULES C. RANDAL,

Petitioners' Counsel

⁶ See opinion of Judge Frank, 128 F. (2d) pp. 897-901.

Certificate Pursuant to Rule 33

We hereby certify that we have read the foregoing petition and fully believe that it is interposed in good faith and not for delay.

ELLSWORTH C. ALVORD,
JULES C. RANDAL,
Petitioners' Counsel.

Dated: November 12, 1942.

New York Civil Practice Act, §19

“§19. **Effect of defendant's absence from state or residence under false name.** * * * If, after a cause of action has accrued against a person, he departs from the state and remains continuously absent therefrom for the space of one year or more, * * * the time of his absence * * * is not a part of the time limited for the commencement of the action. * * *





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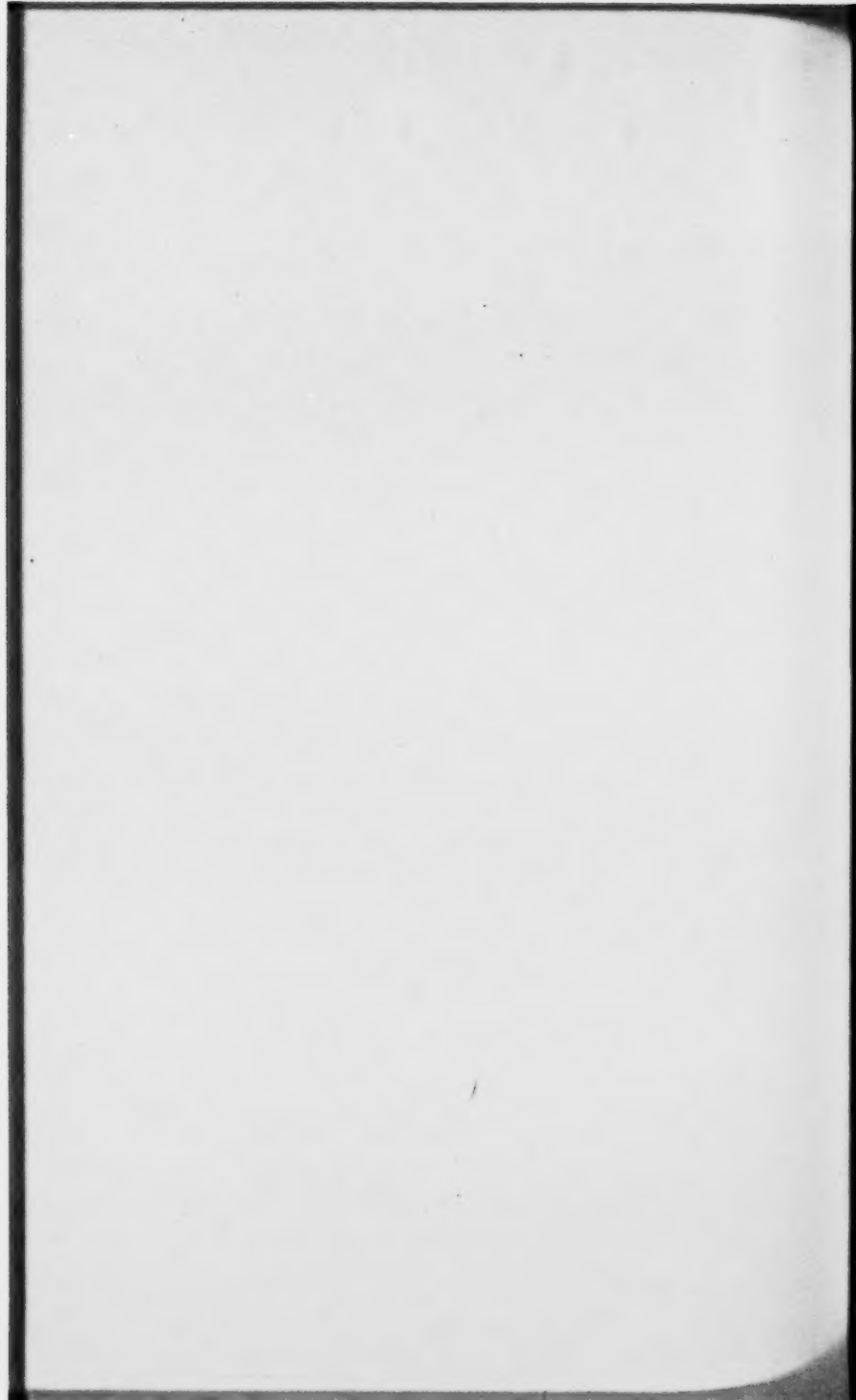
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Respondents.

**BRIEF OF ALL RESPONDENTS IN OPPOSITION TO
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FOR CERTIORARI**

HAROLD R. MEDINA,
JOHN W. DRYE, JR.,
LOUIS L. BABCOCK,
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Respondents' Counsel.



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BRIEF OF ALL RESPONDENTS IN OPPOSITION TO PETITION FOR REHEARING OF APPLICATION FOR CERTIORARI.

The present application is but a reiteration of contentions more extensively made and argued at pages 29, 30, 37, 38 and 48 of plaintiffs' petition and brief in support of the recent application for a writ of certiorari, and at pages 2, 3 and 11 of their reply brief. No new questions are raised and no arguments adduced that were not fully considered and disposed of by the Court in its recent decision.

Our position on the merits and on the question of the statute of limitations was fully stated in our briefs in opposition to the previous application and need not be restated.

The petition for rehearing should be in all respects denied.

Respectfully submitted,

HAROLD R. MEDINA,
JOHN W. DRYE, JR.,
LOUIS L. BABCOCK,
NOEL S. SYMONS,
MASON O. DAMON,
WILLIAM GILBERT,
Respondents' Counsel.

